DOCKET

EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 123186

CASE NBR 86-1-05272 CSY CASE STATUS: DECIDED
SHORT TITLE Spierings, Onno J. DOCKETED: Aug 2 1986
VERSUS Alaska TIME QUESTION

Entry	Date	Note	Proceedings and Orders
1	May 31 1986		Application for extension of time to file petition and order granting same until July 31, 1986 (Rehnquist, June 5, 1986).
2	Aug 2 1986	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 2 1986		DISTRIBUTED. October 17, 1986
5	Oct 10 1986		Waiver of right of respondent Alaska to respond filed.
6	Oct 1[illegible] 1986	F	Response requested -- BRW.
7	Oct 2[illegible] 1986		Supplemental brief of petitioner Onno J. Spierings filed.
8	Nov 10 1986		Brief of respondent Alaska in opposition filed.
9	Nov 20 1986		REDISTRIBUTED. December 5, 1986
11	Dec 8 1986		REDISTRIBUTED. December 12, 1986
12	Dec 15 1986		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

86-5373

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

NO._____

OTTO J. SPIEGEL, PETITIONER,

V.

STATE OF TEXAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF TEXAS

OTTO J. SPIEGEL, 08294-011
UNITED STATES PENITENTIARY LEWISBURG
3901 Klein Blvd.
LEWISBURG, PENNSYLVANIA 17837

Petitioner Pro-se.

DATED: JULY 20, 1986

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY 1986

NO. 86-5373

ORIGINAL

ONNO J. SPIERINGS, PETITIONER,

V.

STATE OF ALASKA, RESPONDENT,

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Onno J. Spierings, who is now held in a United States penitentiary, asks leave to file the attached petition for a Writ of Certiorari to the State of Alaska Supreme Court without prepayment of costs and to proceed in FORMA PAUPERIS pursuant to Rule 53.

The petitioner's affidavit in support of the motion is attached hereto.

Dated this 22nd day of July, 1986.

Onno J. Spierings

ONNO J. SPIERINGS 80392-011
U.S.P. LOMPOC
3901 Klein Blvd.
LOMPOC, CA 93436

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY 1986

NO.____

ONNO J. SPIERINGS, PETITIONER,

V.

STATE OF ALASKA, RESPONDENT,

AFFIDAVIT

I, Onno J. Spierings, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I.further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this Court are true.

1. Are you presently employed? NO.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you recieved. 1981, Silvers Engineering, Wassilla, Alaska.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? YES.

   a. If the answer is yes, describe each source of income and state the the amount received from each during the past twelve months. STATE OF ALASKA PERMADENT DIVIDENT CHECK $405.00

3. Do you own any cash or checking or savings account? NO.

   a. If the answer is yes, state the otal value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

NO.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Onno J. Spierings 80392-011

Subscribed and Sworn to before me this 20 day of August, 1986.

USP - Lompoc, Cal.

Notary Public - Authorized by Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM 1986

_____

NO._____

_____

ONNO J. SPIERINGS, PETITIONER,

V.

STATE OF ALASKA, RESPONDENT.

_____

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF ALASKA

_____

The petioner Onno J. Spierings respectfully prays that a Writ of Certiorari issue to review the judgement and opionion of the Supreme Court of the State of Alaska entered in this proceeding entered on May 2, 1986.

OPINION BELOW

The sentence and commitment papers of The Superior Court of the State of Alaska, the opinion of the court of Appeals of the State of Alaska, and the opinion of the Supreme Court of the State of Alaska appears in the appendix hereto.

JURISDICTION

Petitioner Spierings was indicted January 1982 in Anchorage, Alaska by the 3rd judicial district of Alaska by Grand Jury of count 1; 1st degree murder and count 2; 1st degree murder.

Spierings was tried April 1983 in Anchorage, by the 3rd judicial district of count 1 and 2 by petit jury of 12, verdicts of guilty to Count 1 and 2 was returned.

Spierings made a timely appeal to the Alaska Court of Appeals . Opionion Dresnek v. State, 697 P.2d 1059 (Alaska App. 1985); Spierings v. State, Summery Disposition No. 817 (Alaska App., April 24, 1985)

A timely appeal was filed with the Supreme Court of the State of Alaska on September 30, 1985. The judgement was also jointly decided on May 2, 1986. Which affirmed the Appealete Courts ruling. On May 20, 1986 petitioner applied for a time extension to file this petition and on June 3, 1986, Mr. Justice Rehnquist extended the time to file this petition before and included July 31, 1986.

This Court has jurisdiction under 28 U.S.C., 1257

QUESTIONS PRESENTED

1.) "Whether a trial court may, over the criminal defendants objection, and in conflict with this courts previous ruling give a transition instruction that the jurors must unanimously find the defendant not guilty of a greater offense before they may render a verdict on whether he is guilty of any lesser included offense."

STATUTORY PROVISIONS INVOLVED

Rules: Alaska R. Crim P. 31 provides in pertinent part:

* * *

(C) CONVICTION OF LESSER OFFENSE. The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or the offense necessarily included therein if the attempt is an offense. When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.

STATEMENT OF CASE

Onno J. Spierings was charged with two counts of first degree murder for the shooting deaths of his parents, which occurred December 28, 1981. (R.3.) At trial, Spierings admitted the shootings, but he denied having the requisite specific intent to kill. He contended that his capacity to form such intent was diminished due to a partial dissociative reaction and that he was, therefore, guilty at most of manslaughter (TR. 836-26, 842-43.)

At Spierings request, the trial court agreed to instruct the jury on second degree murder and manslaughter as lesser-includede offenses of first degree murder (R. 34, 37.) The court proposed a transitional instruction which would allow the jurors to consider a lesser-includede charge only if they unanimously found Spierings not guilty of the greater offense. (TR. 760.) Spierings objected and requested that the word " unanimously", be stricken from the instruction. (TR.760, 764, 767-70.) At two points the state agreed with Spierings (TR. 764, 776), but, after hearing the judge's argument favoring including " unanimously", the state requested the "unanimity" version. (TR.779.) Over continuing defense objection, Judge Ripley then instructed the jurors that they must unanimously find Spierings not guilty of first degree murder before considering any lesser-included charge. (R.35, 36.) Spierings was convicted of first degree murder on both counts. (R. 46-47.) Spierings brought a timely appeal to the Court of appeals of the State of Alaska and the Supreme Court of the State Of Alaska.

REASONS FOR GRANTING THE WRIT

ONLY THIS COURT CAN ADEQUATTLY ANSWER WHETHER TO INSTRUCT OVER THE DEFENDANTS OBJECTION THAT JURORS MAY NOT CONSIDER LESSER-INCLUDED OFFENSES UNLESS THEY FIRST UNANIMOUSLY FIND THE DEFENDANT NOT GUILTY OF THE GREATER CHARGE,IS ERROR AND INVIOLATION OF DUE PROCESS AND OR EQUAL PROTECTION OF CONSTITUTIONAL LAW FOR THE LOWER STATE COURTS, IN LIGHT OF THIS COURTS PAST RULINGS.

The Court of Appeals of the State of Alaska and the Supreme Court of the State of Alaska held that it is not error to instruct, over objection, that jurors may not consider a lesser-included offense unless and untill they unanimously find the defendant not guilty of the greater charged crime.

With such an instruction the doctrine of instructing on lesser-included charges becomes a device to aid the prosecution only; criminal defendants are effectively denied the intended reciprocal benefit of lesser-included offense instructions. The "unanimously not guilty" requirement threatens defendants rights to conviction only on proof beyond a reasonable doubt by tending to coerce jurors to render a guilty verdict on the greater charge, and it improperly interferes with jury deliberations. The nonunanimity transitional instruction proposed by the defendants in these cases assists jurors to reach unanimous verdicts, and it has no illogical or undesirable douch jeopardy consequences.

Finally, the weight of authority from other jurisdictions runs contrary to the Court of Appeals of the State of Alaska and the Supreme Court of the State of Alaska decisions.

Because the lower Alaskan Courts rulings are in direct conflict with this Courts previous ruling in BECK v. ALABAMA, 447 U.S. 625 and KEEBLE v. U.S., 412 U.S. 205 and may set a trend for other states to follow that is in conflict with this court. Certiorari petitioner prays this Court for review and reversal of Alaska's lower court rulings.

REQUIRING THE JURY TO FIND UNANIMOUSLY THAT THE DEFENDANT IS NOT GUILTY OF A GREATER CHARGE BEFORE CONSIDERING A LESSER CHARGE DENIES DEFENDANTS THE BENEFITS OF A LESSER-INCLUDED OFFENSE INSTRUCTION.

* * *

(1.) THE LESSER-INCLUDED OFFENSE DOCTRINE IS DESIGNED TO BENEFIT BOTH THE PROSECUTION AND THE DEFENSE.

The appropriateness of a particular transitional instruction, advising juries when they may or may not consider lesser-included charges, can only be understood against the background of the doctrine of lesser-included offenses in general. That background is presented here briefly.

According to legal scholars, the doctrine of lesser-included offenses evolved at common law originally to protect the prosecution in cases where the proof failed to show some element of the crime charged but did establish that [illegible] crime had been committed. 2 C. Wright, Federal Practice & Procedure 515, at 372; KEEBLE V. UNITED STATES, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973). Over the centuries, a reciprocal benefit from properly given lesser-included offense instructions protects defendants constitutional rights as well. In the words of the United States Supreme Court:

> (I)T has long been recognized that (giving lesser-included offense instructions) can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. BECK V. ALABAMA, 447 U.S. 625, 633, 65 L. Ed. 2d. 392, 400 (1980).

The BECK Court quoted from an earlier opinion:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. KEEBLE V. UNITED STATES, 412 U.S. at 212-13, 36 L. Ed. at 850, quoted at 447 U.S. at 634, 65 L. Ed. 2d at 400-01.

According to the Supreme Court, "(P)roviding the jury with the 'third option' of convicting on a lesser-included offense ensures thatthe jury will accord the defendant the full benefit of the reasonable-doubt standard." 447 U.S. at 633, 65 L. Ed 2d at 400. The Court further noted that "the nearly universal acceptance of the rule (requiring giving instructions on lesser-included offenses) in both state and federal courts establishes the value to the defendant of this procedural safeguard" and said that the failure to give a lesser-included offense instruction "would seem inevitably to enhance the risk of an unwarranted conviction." Id. at 637, 65 L. Ed. 2d at 402-03.

(2.) THE "UNANIMOUSLY NOT GUILTY" TRANSITIONAL INSTRUCTION DENIES DEFENDANTS THE BENEFITS OF THE LESSER-INCLUDED OFFENSE INSTRUCTION.

Analysis of both sides benefits from lesser-included offense instructions provides the basis for the federal court decisions holding that the defendant at his option must be allowed to have the jury given a "nonunanimity" transitional instruction. The leading federal case is UNITED STATES V. TSANAS, 572 F.2d 340 (2d Cir), Cert. Denied, 435 U.S. 995, 56 L. Ed. 2d 84 (1978)

In Tsanas, the Second Circuit examined the respective advantages and disadvantages of lesser-included offense instructions. In the eyes of the Tsanas court, the government benefits from lesser-included offense instructions, because it can avoid an acquittal and win a conviction on a lesser charge even if its proof at trial fails to convince a jury of all elements of the crime originally charged. The defendant benefits because, without a lesser-included offense option, the jury may convict on the greater charge rather than acquit entirely if the government does not prove the offense charged beyond a reasonable doubt but does prove the defendant is guilty of some crime. This advantage to the defendant is counterbalanced by the risk of a compromise guilty verdict on the lesser-included charge instead of an acquittal. The prosecution is disadvantaged by the risk that the jury may make too little effect to achieve unanimity on the greater charge and move too readily to convict only on the lesser offense. Id. at 345-46.

In light of these complementary advantages and disadvantages, the Tsanas court then considered the advantages and disadvantages of jury instructions requiring unanimous acquittal on one charge before consideration of a lesser offense. The unanimous not guilty requirement benefits the prosecution, the court recognized, because it keeps the jury from too easily shirking its duty regarding the greater offense; the government is disadvantaged by a unanimity instruction because the likelihood of a hung jury increases, and the prosecution might be prevented from securing a conviction on any charge. The defendant benefits from an instruction requiring unanimity, the court thought, since the jury is somewhat more likely to hang, thereby allowing the defendant to avoid any conviction; however, the defendant is disadvantaged by the unanimous not guilty requirement because the jury is more likely to compromise and to convict on the greater offense, even though the proof was insufficient, in preference to forcing a mistrial. Id. at 346.

An instruction which does not require the jury to reach a unanimous not guilty verdict before considering a lesser charge has correspondinding disadvantages and advantages for each side, the Tsanas court said. Id. Thus, the court concluded:

> With the opposing considerations thus balanced, we cannot say that either form of instruction is wrong as a matter of law. The court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects. It is (the defendant's) liberty that is at stake, and the worst that can happen to the Government under the less rigorous instruction is (the defendant's) readyer conviction for a lesser rather than a greater crime. As was said in BELL V. UNITED STATES, 349 U.S. 81, 83, 99 L. Ed. 905, 910 (1955), albeit in a different context:
>
> > It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher penalty. 572 F.2d at 346 (emphasis added).

The Ninth Circuit followed Tsanas in United States v. Jackson, 726 F. 2d 1466, 1469 (9th Cir. 1984). Jackson recognized even more clearly than Tsanas that the "unanimously not guilty" requirement prejudices a defendant in the same manner as failing to give a lesser-includede offense instruction. The Jackson court quoted the key passage from Keeble (set forth, supra, at 7), explaining that the defendant is entitled to a lesser-ingluded offense instruction because of the risk that without the lesser charge jurors will convict of the greater charge, even absent proof beyond a reasonable doubt, since to the jury the defendant is plainly guilty of something and should not be let go. The Jackson court continued:

> The same risk is created by an instruction that the lesser cannot be considered unless the jury first agrees unanimously that the defendant is not guilty of the greater offense. 762 F.2d at 1470.

In words precisely applicable to the cases joined in this appeal, the Jackson court concluded:

> The instruction given by the court did not allow the jury to consider the lesser offense unless the jury first unanimously acquitted defendant of the greater offense. Under this instruction the jury could not consider the lesser offense at all if unable to agree on a verdict for the greater offense. Theoretically, the result would be a mistrial. Practically, however, in this case the risk was substantial that jurors harboring a doubt as to defendant's guilt of the greater offense but at the same time convinced that defendant had committed some offense might wrongly yield to the majority and vote to convict of the greater offense rather than not convict defendant of any offense at all.... The instruction requested by defendant would have avoided this risk and thus should have been given. Id.

With the unanimity rule, the pressures on jurors to abandon their conscientious beliefs in order to reach a verdict are enormous. The only alternative, hanging the jury, is not perceived as an acceptable alternative by many jurors. Juries jobs are to decide cases, so most jurors must feel as if they've failed if they do not reach a verdict. Further, as the United States Supreme Court has said, "It is extremely doubtful that juries will understand the full implications of a mistrial or will have confidence that their choice of a mistrial option will ultimately lead to the right result." [illegible], 447 U.S. at 644, 65 L. Ed. 2d at 407(footnote omitted)

see also People v. Geiger, 674 P.2d 1303, 1306-08 (Cal. 1984). That is why in Beck the Supreme Court held that the jury in the capital case on review must be provided with the opportunity to find the defendant guilty of a lesser-included offense supported by the evidence; the Court found that the "mistrial option" is not adequate protection for the defendant against a coerced and inaccurate guilty verdict. Id. at 644-45, 65 L. Ed. 2d at 407.

The transitional instruction used by the court over defendants' objections in these cases denied defendants any benefit of having the jury instructed on lesser-included charges. Instructing jurors that they may not consider a lesser-includedoffense unless and until they unanimously find the defendant not guilty of the greater charge protects the state against possible failure in its proof, but it only hurts and cannot help the defendant. A defendant who can persuade a unanimous jury that he is not guilty of the charged offense would clearly prefer to be acquitted outright; he gains nothing by asking the jury then to consider if he is guilty of a lesser crime. The Dresnak decision virtually tells defense attorneys they commit malpractice when they request a lesser-included offense instruction, for no competent attorney would ask a jury to convict his or her client of a lesser crime after the jury has unanimously acquitted the defendant of the one crime with which he was charged. The system whereby lesser-included offense instructions benefit both sides works only when jurors are permitted to consider lesser charges if they cannot unanimously agree on the defendants guilt of the greater charge.

Defendant in the present appeal believe that the coercive nature of the "unanimously not guilty" transitional instruction has been amply demonstrated. When the defendant timely requests, he should be entitled to an instruction not requireing the jury unanimously to find him not guilty of the charged offense before considering the lesser-included offenses.

CONCLUSION

For all the reasons set forth above, petitioner hereto prays that this Court accept this petition for certiorari in Pro-se, appoint counsel if additional litigation becomes necessary for a proffesional presentation for review of issues presented herein can be obtained, review fully cause petitioned herein, and should this court find its and other federal courts rulings are still valid and favorable to petitioner cause, overrule and reverse lower Alaska State courts rulings, as to this petitioners trial being unvalid and being against the United States Constitutional Garantees against due process and equal protection of the law.

Respectfully submitted,

DATED this 22nd day of July. 1986.

ONNO J. SPIERINGS, 80192-011
U.S.P. LOMPOC
3901 Klein Blvd.
Lompoc, CA 93436.

Petitioner Pro-se.

THE COURT OF APPEALS OF THE STATE OF ALASKA

ONNO J. SPIERINGS, Appellant, v. STATE OF ALASKA, Appellee.	)	File No. A-64 SUMMARY DISPOSITION* [No. 817 - April 24, 1985]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Tina Kobayashi, Assistant Public Defender, and Dana Fabe, Public Defender, Anchorage, for Appellant. Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.

Onno J. Spierings shot and killed his parents and was convicted of two counts of first-degree murder. AS 11.41.100(a)(1). He received two concurrent sentences of fifty years with thirty years suspended. Spierings appeals, making two arguments. First, he contends that the trial court erred in giving a transitional instruction, requiring that the jury unanimously acquit him of first-degree murder before it could consider the lesser-included offense of second-degree murder. We rejected Spierings' argument in Dresnek v. State, ___ P.2d ___, Op. No. 455 (Alaska App., April 12, 1985), and Nell v. State, 642 P.2d 1361 (Alaska App. 1982). We find no error.

Spierings next argues that the trial court abused its discretion by allowing into evidence a photograph, taken by the police, of Spierings' open suitcase. The picture depicts four paperback books on top of clothing. The titles of three of the books were visible: War God, Soldiers for Hire, and The Badge of the Assassin. Spierings argues that the only issue in controversy at trial was his mens rea at the time of the incident since he conceded shooting his parents but contended that diminished responsibility reduced his offense to manslaughter. He reasons that a jury considering the titles of his chosen reading matter might infer a violent disposition and an intent to kill and reject his claim of diminished responsibility.

We are satisfied that the trial court did not abuse its discretion. While hardly conclusive, the neatness with which Spierings packed his bag and his inclusion of reading material, regardless of the content of that material, provided some evidence that Spierings was not in a dissociative state at the time he packed the suitcase and therefore at approximately the time he killed his parents. A.R.E. 401. In addition, given the substantial evidence at trial regarding Spierings' interest in firearms, ammunition and related material, admission of the evidence, even if error, was harmless. See Love v. State, 457 P.2d 622 (Alaska 1969). Cf. A.R.E. 403.[1]

*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

1. In Page v. State, 657 P.2d 850, 851-53 (Alaska App. 1983), we affirmed a trial court decision refusing to admit evidence that the victim read pornographic books which the defendant offered to show that

(Footnote Continued)

The judgment of the superior court is AFFIRMED.

(Footnote Continued)

the victim was likely to commit homosexual rape. We reasoned that in the absence of expert testimony the nexus between reading pornography and committing homosexual rape was speculative. We distinguished Keith v. State, 612 P.2d 977, 983-84 (Alaska 1980), where the supreme court permitted evidence that the victim had written a journal which disclosed violent thoughts to support an inference that the victim was the aggressor because the nexus between violence and aggression may be a matter of common knowledge. In the instant case, there was some evidence introduced through Dr. Martin Blinder to show a nexus between the books in Spierings' suitcase and the state's theory of the case.

THE SUPEME COURT OF THE STATE OF ALASKA

STEPHAN J. DRESNEK,
Petitioner,
v.
STATE OF ALASKA,
Respondent.

File No. S-963

O P I N I O N

ONNO J. SPIERINGS,
Petitioner,
v.
STATE OF ALASKA,
Respondent.

File No. S-973

CONDRAT KRUKOFF,
Petitioner,
v.
STATE OF ALASKA,
Respondent.

File No. S-1085

ROBERT OKPEAHA, JR.,
Petitioner,
v.
STATE OF ALASKA,
Respondent.

File No. S-1122

JOHN B. BALENTINE,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

File No. S-1231

[No. 3049 - May 2, 1986]

Petition for Hearing from the Court of Appeals of the State of Alaska, Appeal from the Superior Court, Third Judicial District, Anchorage, Seaborn J. Buckalew, Jr., Judge. Petition for Hearing from the Court of Appeals of the State of Alaska, Appeal from the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, Judge. Petition for Hearing from the Court of Appeals of the State of Alaska, Appeal from the Superior Court, Third Judicial District, Anchorage, Ralph E. Moody and Seaborn J. Buckalew, Judges. Petition for Hearing from the Court of Appeals of the State of Alaska, Appeal from the Superior Court, Second Judicial District, Barrow, Michael I. Jeffery, Judge. Petition for Hearing from the Court of Appeals of the State of Alaska, Appeal from the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Susan Orlansky, Assistant Public Defender, Anchorage, Dana Fabe, Public Defender, Anchorage, for Petitioner Stephan A. Dresnek. Robert D. Bacon, Assistant Attorney General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Respondent. Tina Kobayashi, Assistant Public Defender, Anchorage, Dana Fabe, Public Defender, Anchorage, for Petitioner Onno J. Spierlings. Robert D. Bacon, Assistant Attorney General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Respondent. Susan Orlansky, Assistant Public Defender, Anchorage, Dana Fabe, Public Defender, Anchorage, for Petitioner Condrat Krukoff. Cynthia M. Hora, Assistant Attorney General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Respondent. William A. Davies, Assistant

Public Defender, Fairbanks, Dana Fabe, Public Defender, Anchorage, for Petitioner Robert Okpeaha, Jr. Robert D. Bacon, Assistant Attorney General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Respondent. Sen K. Tan, Assistant Public Defender, Anchorage, Dana Fabe, Public Defender, Anchorage, for Petitioner John B. Balentine. Robert D. Bacon, Assistant Attorney General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Respondent.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

PER CURIAM

RABINOWITZ, Chief Justice, and BURKE, Justice, dissenting.

We have granted review in these cases, limited to the question of "whether a trial court may give, over the criminal defendant's objection, a 'transition' instruction that the jurors must unanimously find the defendant not guilty of a greater offense before they may render a verdict on whether he is guilty of any lesser included offense." The court of appeals answered this question in the affirmative. We agree for the reasons stated by the court of appeals in Dresnek v. State, 697 P.2d 1059 (Alaska App. 1985).

AFFIRMED.

Rabinowitz, Chief Justice, joined by Burke, Justice, dissenting

I would reverse the court of appeals' decision in Dresnek v. State, 697 P.2d 1059 (Alaska App. 1985). There is a real danger that instructing the jury that they cannot enter a guilty verdict on the lesser included offense unless they first unanimously acquit on the greater offense will vitiate a defendant's right to a lesser included offense instruction.

We have held that a trial court's failure to give an instruction properly requested by the defendant on a lesser included offense is error. Christie v. State, 580 P.2d 310, 318 (Alaska 1978). We stated the rationale for our ruling as follows:

> [W]hen facts are put in evidence which support instructions as to lesser degrees and they are not given, the jury may be faced with the choice either of acquitting a man who is obviously guilty of some wrong or of finding guilty a man who is not guilty of the crime charged.

Id. at 318 (citations omitted). This pressure to convict is magnified when eleven jurors vote to convict on the charged offense, and one juror has a reasonable doubt as to defendant's guilt on that offense, but believes the defendant guilty of some offense. The pressure could be enormous on that juror to vote to convict on a charge of which he has reasonable doubt, rather than to "hold out" and leave a guilty defendant unconvicted. The lesser included

instruction is therefore necessary to ensure that the defendant is "accorded the full benefit of the reasonable doubt standard," Beck v. Alabama, 447 U.S. 625, 634, 65 L.Ed.2d 392, 400 (1980), and to protect against "the substantial risk that the jury's practice will diverge from theory." Keeble v. U.S., 412 U.S. 205, 212, 36 L.Ed.2d 844, 850 (1973).[1] Defendant's right to such an instruction is required by due process in capital cases, Beck, 447 U.S. at 637-38, 65 L.Ed.2d at 402-03, and arguably is required by due process in non-capital cases. See, Hopper v. Evans, 456 U.S. 605, 611-12, 72 L.Ed.2d 367, 373 (1982); Ferazzo v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984); Miller v. Stagner, 757 F.2d 988, 993 (9th Cir. 1985).

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1. The Supreme Court stated in Beck:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. 447 U.S. at 634, 65 L. Ed.

(footnote continued)

If the jury is instructed that it cannot convict a defendant of the lesser included charge unless it first unanimously votes to acquit on the greater charge, it will be subjected to the same pressure to ignore the reasonable doubt standard that it would face if no lesser included offense instruction were given at all. If the jury is split eleven to one for conviction on the greater charge, the juror who has a reasonable doubt as to defendant's guilt on the greater charge but who would convict on the lesser included, will be faced with the same dilemma of voting to convict on the greater offense or leaving a guilty defendant unconvicted by forcing a mistrial. See, United States v. Tsanas, 572 F.2d 340, 345-46 (2nd Cir. 1978), cert. den. 435 U.S. 995, 56 L.Ed.2d 94 (1978); United States v. Jackson, 726 F.2d 1466, 1470 (9th Cir. 1983) (per curiam). The dissenting juror knows that the defendant cannot be convicted on the lesser included offense unless the other eleven jurors, convinced beyond a reasonable doubt, change their minds and vote to acquit on the greater offense.

The court of appeals' opinion, which a majority of this court now adopts, is unresponsive to this argument.

(footnote continued)

2d at 400-401, quoting from Keeble, 412 U.S. at 212-213, 36 L.Ed.2d at 850 (emphasis in original).

The court of appeals characterized the argument as suggestive that the unanimity instruction was coercive:

> . . . in that it prevents the jury from even considering lesser-included offenses until they have reached final agreement on the greater offense. Thus a juror convinced that defendant was innocent of a greater offense but guilty of the lesser offense might convict of the greater offense rather than vote his conscience if he did not understand that conviction of the lesser offense was a possible outcome. Dresnek, 697 P.2d at 1062.

The court of appeals responded that since a jury cannot consider the elements of the greater offense without simultaneously considering the elements of the lesser offense, "it is difficult to see how a juror would be unaware that a unanimous conviction on the lesser was an alternative to an acquittal on all charges." Id. at 1062.

The problem, however, is that whether or not the jury can "consider" the lesser included offense, the juror "holding out" for acquittal on the greater offense still knows that because of the unanimity instruction the defendant cannot be convicted for the lesser included offense. The court of appeals did seem to recognize the possibility that a juror would prefer conviction on the greater charge to a mistrial. 697 P.2d at 1063, n.7. The court of appeals stated:

> Such a juror cannot, however, prevent the state from obtaining a mistrial on the greater if the jury cannot agree

about it no matter what the jury is prepared to do with the lesser offense. Id.

This argument does not respond to the possibility that such a juror could "prevent mistrial" by voting to convict on the greater charge, even though he was not convinced beyond a reasonable doubt.

The state emphasizes its entitlement to a verdict on the charged offense. In this regard it argues that not instructing the jury that it must unanimously acquit on the greater offense in order to enter a verdict on the lesser included offense inevitably will lead to "compromise verdicts" where the jury will not vigorously deliberate the greater charge, but instead will quickly slide to the common ground of a guilty verdict on the lesser included charge. The state believes that this possibility is particularly unfair because if the jury convicts on the lesser included offense, the jury's silence on the greater charged offense would serve as an "implied acquittal", precluding the state from retrying the defendant on that offense. See, Price v. Georgia, 398 U.S. 323, 26 L.Ed.2d 425 (1970).

It should not be lightly assumed that a jury that is instructed that it must use all reasonable efforts to reach a verdict on the charged offense will ignore this instruction and quickly reach a verdict on the lesser included offense. A conviction on a lesser included charge

is not a "compromise" verdict if all the jurors agree that the defendant is guilty of this charge and genuinely disagree about whether the defendant is guilty of the greater charge.

While the state's arguments are not without merit, they are outweighed by the defendant's fundamental concerns that a unanimity instruction may result in his conviction on the greater offense by a jury consisting of some jurors who have reasonable doubt as to his guilt on that charge. As one court put it, the defendant should at least be allowed to choose the instruction because "[i]t is his liberty that's at stake." Tsanas, 572 P.2d at 346.

I conclude therefore that it was reversible error for the superior court to have refused to instruct the jury as the defendants requested.[2] See, Tsanas, 572 P.2d 346; Jackson, 726 F.2d 1464; Catches v. United States, 582 F.2d 453, 458-59 (8th Cir. 1978); State v. Forbes, 647 P.2d 1301,

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2. I agree with the result the majority reaches in Stasel. Stasel v. State, ___ P.2d ___ (Op. No. 3050, Alaska, May 2, 1986). Since Stasel was not convicted at his first trial there is no possibility that the first jury was coerced into convicting him on the greater offense by the unanimous acquittal instruction. I agree with the majority's decision to dismiss Stasel's petition for hearing as improvidently granted on the issue of whether double jeopardy bars reprosecution for a charged offense where the jury indicates it is unable to reach a verdict as to that offense and the court declares a mistrial over defense objection.

1305 (Kan. 1982) ("if you cannot agree" instruction not error because it did not require jury to unanimously acquit on the greater offense); People v. Mays, 288 N.W.2d 207 (Mich. 1980) (per curiam); State v. Muscatello, 387 N.E.2d 627 (Ohio App. 1977), aff'd, 378 N.E.2d 738 (Ohio 1978); State v. Martin, 668 P.2d 479 (Or. App. 1983).

SUPPLEMENTAL BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

ORIGINAL

#86-5373

Spriggs v. Alaska

Supplement to Petition

9/23/86

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY 1986

NO. 86-5373

ONNO J. SPIERINGS, PETITIONER,

V.

STATE OF ALASKA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ALASKA

MOTION FOR LEAVE TO FILE A LATE JURISDICTIONAL STATEMENT

WITH THE QUESTION IN CHIEF INCLUDED THEREIN

I, ONNO J. SPIERINGS, hereto motion this Court Pro-se for leave to file a late "jurisdictional statement" with the question in chief included therein, as it was inadvertently omitted when petition was originally submitted because of petitioners lack of experience and knowledge of this Courts procedures.

DATED: September 23, 1986.

Respectfully Submitted,

Onno J. Spierings

ONNO J. SPIERINGS, Petitioner

Reg. No. 80392-011
U.S.P. Lompoc
3901 Klein blvd.
Lompoc, CA 93436.

ORIGINAL

IN THE

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ONNO J. SPIERINGS, PETITIONER,

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STATE OF ALASKA, RESPONDENT,

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JURISDICTIONAL STATEMENT

DATED: September 23, 1986.

Onno J. Spierings

Onno J. Spierings, Petitioner.

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CITATIONS

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IN THE

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JANUARY 1986

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ONNO J. SPIERINGS, PETITIONER,

V.

STATE OF ALASKA, RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

ONNO J. SPIERINGS, the petitioner herein, petitioning this Court by way of Certiorari from the condensed final judgement of the State of Alaska's Supreme Court rendered May 2nd, 1986; *SEE: DRESNEK v. STATE, 718 P.2d 156 (Alaska Supreme Court. 1986); which affirmed the State of Alaska's Court of Appeals condensed ruling;

*SEE: DRESNEK v. STATE, 697 P.2d 1059 (Alk. Ct. of App. 1985); which affirmed "the judgement and sentence of the Superior Court", where the trial occurred and where the lesser included offenses "unanimous" transitional instruction was given to the Petit Jury that is presently in question.

cont., on page 2

OPINIONS BELOW

1) Superior Court for the State of Alaska, 3rd Judicial District, Honorable Judge J. Justin Ripley presiding in Anchorage, Alaska, gave his opinion on the subject of the lesser included offenses' "unanimous" transitional instruction during trial reported on Trial Transcript Page (T.Tr.Pg.) 777 lines 11-25 through page 778 lines 1-8. (See; Exhibit - A appendixed hereto).

2) Court of Appeals of Alaska in Anchorage, Honorable Judge J. Singleton gave the opinion of the Court, reported Summary Disposition No. 817 April 24, 1985. The Court overruled the petitioners objection to the "unanimous" finding of innocense prior to considering lesser included offenses' "unanimous" transitional instructions, upholding trial Courts sua sponte placing of the word "unanimous" in the Petit Jurors instructions; (See: EXHIBIT - H)

*SEE: DRESNEK v. STATE, 697 P.2d 1059 (Alk. Ct. of App. 1985)

3) The Supreme Court for the State of Alaska in Anchorage, in a Per Curiam decision rendered by Honorable Justices Chief Justice Rabinowitz together with Burke, Matthews, Compton and Moore, upholding the Alaska Court of Appeals affirmance of the Trial Courts lesser included offenses' "unanimous" transitional instruction to the Petit Jury during trial;(See: EXHIBIT - J)

*SEE: DRESNEK v. STATE, 718 P.2d 156 (Alaska Supreme Court 1986)

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JURISDICTION

The judgment of the Superior Court of the State of Alaska, convicting the petitioner on two (2) counts of Murder in the first degree was entered on April, 1983.

A timely appeal was entertained with the Court of Appeals for the State of Alaska and denied on April 24, 1985, see appendix for opinion.

Petitioner subsequently filed an appeal on that decision with the Supreme Court of the State of Alaska which rejected petitioners argument on May 2, 1986.

Petitioner submitted a motion for extension of time in which to file a petition for Certiorari which was granted by Honorable Justice Rehnquist on June 3, 1986.

Petition for Certiorari was filed and assigned No. 5373 on August 2, 1986.

The Court has original jurisdiction of Federal questions previously ruled on but disobeyed by State Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

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QUESTION PRESENTED

Does the United States Constitution's supremacy clausees safeguarding the peoples' due process of law demand that an unrestricted lesser included offense instruction be given when timely requested by the defence, to be effective as a "third option" to the petit juries, in all criminal cases where the evidence would support a conviction of a lesser included offense to make a conviction Constitutionally maintainable, and if so, can the Courts of the State of Alaska obtain Constitutionally maintainable criminal convictions while specifically ignoring these same due process guidelines held protected to some degree in this Court's previous rulings, thus, not only in effect overruling this Court's previous rulings, but also setting an example for the rest of the lower state and federal courts to follow, or is this type of due process afforded, according to this Court's previous holdings, meaning only to defendants in capital cases where the death penalty may be imposed?

cont., on page 5

CONSTITUTIONAL PROVISIONS & RULES

ALASKA'S CONSTITUTION, ARTICLE 1, SECTION 1:

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, oppertunities, and protection under the law; and that all persons have corresponding obligations to the people and to the state.

ALASKA'S CONSTITUTION, ARTICLE 1, SECTION 7:

> No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

UNITED STATE'S CONSTITUTION, ARTICLE IV, SECTION 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States.

UNITED STATE'S CONSTITUTION, ARTICLE VI, PARAGRAPH 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;..... shall be the supreme Law of the Land; and the Judges in every "State" shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL "BILL OF RIGHTS"

UNITED STATE'S CONSTITUTION'S FIFTH AMENDMENT:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

con ., on page 6

CONSTITUTIONAL PROVISIONS & RULES cont.,

> property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION'S SIXTH AMENDMENT:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION'S FOURTEENTH AMENDMENT:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

cont., on page 7

STATEMENT OF THE CASE

January 6, 1982 petitioner was indicted on two counts of first degree murder. (Case No. 3AN - 81 - 8030CR.) Jury trial was held in Anchorage the 3rd Judicial District Superior Court of Alaska on April 20, 1983 with Honorable Judge J. Justin Ripley presiding.

On each count, the Jury was instructed on second degree murder and manslaughter as lesser included offenses. The Court over defense objection, instructed the jury that they must "unanimously" find petitioner not guilty of the greater offense charged, before considering the lesser included offenses' instructions. Petitioner's Counsel objected to the incision of the word "unanimous" in the lesser included offense transitional instruction and urged that the word "unanimously" be omitted. (See: EXHIBITS - A through F).

The jury convicted petitioner of first-degree murder on both counts.

Appeal was timely taken to the Alaska's Court of Appeals on 23rd of April, 1984 from the conviction. The Court of Appeals of the State of Alaska affirmed the conviction summarily. (See: Summary Disposition No. 817 April 24, 1985, Court of Appeals of Alaska). (See: EXHIBIT - E)

«SEE: LEGNAE v. STATE, 697 P.2d 1059 (Alk. Ct. of App. 1985)

A timely appeal was taken from the State of Alaska's Court of Appeals' affirmance of the conviction to the State of Alaska's Supreme Court, on September 30th, 1985, the highest court of redress in the State of Alaska. The Supreme Court affirmed the judgement of the Court of Appeals for the State of Alaska on May 2nd, 1986 (See: EXHIBIT - F).

«SEE: DRESNEK v. STATE 718 P.2d 156 (Supreme Court of Alaska. 1986).

The question asked herein still remains substantialy open as to this petitioner's due process of law.

cont., on page 8

RAISING THE FEDERAL QUESTION

1) Assistant Puplic Defender John B. Salemi, in his capacity as trial counsel, objected to the lesser included offense "unanimous" State transitional instruction several times during trial proceedings concerning jury instructions on April 26th, 1983, in the Superior Court of Alaska in the Third Judicial District in Anchorage.

(a) First objection by trial counsel Mr. Salemi found in "EXHIBIT - A" pages 759 line 25 through page 760 lines 1-16.

(b) Second point showing preference is found in "EXHIBIT - B" page 762 lines 2-4.

(c) Third point showing Court's recognition of Mr. Salemi's objection is found on page 764 lines 1-14.

(d) Fourth point showing Mr. Salemi's second objection to the Petit Juries having to find unanimously not guilty of offense charged prior to being allowed to consider the Courts lesser included offense "unanimous" transitional instruction can be found in "EXHIBIT - B" page 767 lines 22-25 through page 768 and page 769 lines 1-6.

(e) Fifth point showing prosecutions original non-objection to trial counsel's objection to the inclusion of the word "unanimously" in the petit juries instructions can be found in "EXHIBIT - E" page 776 lines 10-17.

(f) The sixth point is where the Trial Court's "judgment" as to the inclusion of the word unanimously in the court's lerser included offense' "unanimous" transitional petit jury instruction can be found in "EXHIBIT - F" page 777 lines 11-25, all of page 778 and on page 779 lines 1-10.

(g) The seventh point is where the trial court actually gave the lesser included offense "unanimous" transitional petit jury instructions to petitioner's jury at trial and can be found in "EXHIBIT - G" page 883 lines 18-25 through page 884 lines 1-6.

2) On direct appeal from the Superior Court of Alaska to the Court of Appeals for the State of Alaska, Assistant Public Defender Tina

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JURISDICTIONAL STATEMENT Cont.,

RAISING THE FEDERAL QUESTION cont., -

Kobayashi argued against the lesser included offenses' "unanimous" transitional instruction in a petition filed on April 23rd, 1984 and designated No. A-64. That Court denied petitioners appeal on April 24, 1985, (Summary Disposition No. 817, See: EXHIBIT - H),

«SEE: DRESNEK v. STATE, 697 P.2d 1059 (Alk. Ct. of App. 1985)

3) On direct appeal from the Alaska Court of Appeals to the highest court of redress the Supreme Court of Alaska. Assistant Public Defender Tina Kobayashi rear[illegible] the question of the lesser included offenses "unanimous" transitional instruction in a petition filed on September 30th, 1985, designated as No. S-973 by the Supreme Court of Alaska. Appeal was denied on May 2nd, 1986, (See: EXHIBIT - J).

«SEE: DRESNEK v. STATE, 718 P.2d 516 (Alaska Supreme Court 1986).

«NOTE: Petitioner hereby apologizes for not being able to appendix his counsel's petitions used on appeals filed in the Court of Appeals for the State of Alaska and the Supreme Court for the State of Alaska, since they are rather lenghty and due to limited time and funds of the petitioner it is not possible to appendix them hereto. If this Court should deem that a copy of the appeals is necessary this petitioner will make every effort possible to afford this Court proper copies.

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JURISDICTIONAL STATEMENT Cont.,

THE QUESTION IS SUBSTANTIAL

The question asked herein is substantial because it effects this Court's previous holdings interpreting the Federal Constitution's due process of law supremacy clause's applicability and authority to dictate uniform due process protection standards to lower courts to follow that involve lesser included offense instructions that effect all criminal convictions of defendants in both state and federal courts, but specifically as to capital offenses in state courts where punishment available is other than the death penalty.

«SEE: KEEBLE v. UNITED STATES, 412 U.S. 205, 208 (1973)

> .....the Government explicitly concedes that any non-Indian who had committed this same act ..... and requested this same instruction would have been entitled to the jury charge that petitioner was refused.

«SEE: BECK v. ALABAMA, 447 U.S. 625, 633, 100 U.S. 2382, 65 L. Ed. 2d 392, 400 (1980)

> At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged.

«SEE: BECK v. ALABAMA, supra, 447 U.S. 637, 100 S. Ct. at 2389, 65 L. Ed. 2d at 402;

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious violent offense - but leaves some doubt with respect to an element that would justify conviction of a capital offense - the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

«also See: VICKERS v. RICKETTS, _____ F2d _____, 86 Daily Journal D.A.R. 3057

cont., on page 11

VICKERS v. RICKETTS, cont., - (9th Cir. 1986) Where the 9th Circuit recently rendered a decision by Judge Kennedy that appears to be in accord with this Court's previous opinion and this petitioners cause, citing BECK and Hopper.

The State of Alaska appears to contend that the state's petit juries being required to unanimously aquit their defendants of the greater offense charged prior to being allowed to consider the lesser included offense not charged, over timely defense objection, renders adequate due process of both State and Federal law. Petitioner does not believe it does. This style of modus operandi (M.O.) to acquire a criminal conviction puts the very legality and fairness of the of the specific cause and effect of such a lesser included offense instruction, thus restricted, in extreme doubt because it unjustly prejudices defendants causes while only benefitting the prosecution's cause. All defendants should be allowed to retain their right to be acquited of the offense charged in the indictment. No right should exist for prosecutors to have further guilt issues forced on the Petit Juries.

The original purpose and specific cause and effect for allowing a lesser included offense instruction, although always tainted prejudically by origin and very purpose of assisting the prosecution should it have fallen short of it's burden of proof on the original charges,

«SEE: KEEBLE v. UNITED STATES, supra, at 208;

> Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged, it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.

appears to be only appropriate when there is a strong indication that the petit jury may not agree unanimously on aquital or guilt (in direct conflict with Alaska's cause and effect) and then only if the evidence, that may not support the greater offense charged, supports and would warrant a verdict of guilt on the lesser included offense.

cont., on page 12

«SEE: KEEBLE v. UNITED STATES, supra.

Thus supplying some safeguards to off set the danger of the jury being faced with the choice of being forced to (1) enter a guilty verdict on the greater offense when it is clear that the defendant is not guilty of the greater offense charged but is equally clear that the defendant is guilty of something and should not be set free or (2) enter a verdict of innocence because the prosecution did not meet it's burden of proof "beyond a reasonable doubt" on the charged offense and set a possibly very dangerous person free. Thus, the validity of the cause and effect for a lesser included offense instruction came into being, prejudical as it may be to defendants by origin.

«SEE: KEEBLE v. UNITED STATES, supra 412 U.S. at 208.

It's purpose is still defeated with Alaska's style "M.O." of including the word "unanimously", ie., "unanimously" aquit before lesser included offense instructions can be considered. Why should the lesser included offense instruction be allowed only if (in Alaska) an "unanimous" innocent verdict is rendered, but not when a "unanimous" guilty verdict is rendered?

If the jury is forced to unanimously agree on a verdict, guilty or innocent, then that should be the end of its legal consideration. A verdict of innocent that is rendered unanimously by a petit jury that is also instructed to consider the lesser included offense is likely to cause a violation of double jeopardy by putting defendants on trial twice for the same offense and clearly prejudices defendants due process rights to have the charge(s) charged decided fairly, completly and finally by the petit jury.

What is the difference between being unanimously aquited resulting in release than having the State re-indict for a lesser included offense to attempt to acquire a criminal conviction (double jeopardy and or estopel?) and the State of Alaska's "M.O." perfected in their "lesser included offense "unanimous" transitional instruction" to the Petit Jury (double jeopardy and or estople as to issue being already unanimously decided by Petit Jury)?

cont., on page 13

State of Alaska's M.O. of acquiring criminal convictions explains why inconsistant verdicts are acquired;

«SEE: ROBERTS v. STATE, 680 P.2d 503 (Alk. Ct. of App. 1984), as an example of State's treatment of inconsistent verdicts resulting from the State's M.O. of acquiring criminal convictions ie., lesser included offenses' "unanimous" transitional instructions to petit juries;

and why the state averages such a high conviction rate, no matter whether the defendants are innocent or guilty.

State of Alaska's M.O. using the lesser included offense "unanimous" transitional Petit Jury instruction clearly only benefits the state's prosecutor while defeating the original purpose for a lesser included offense instruction;

«SEE: KEEBLE v. UNITED STATES, supra 412 at 208.

and any due process legitimacy it may have had. Why should the cause and effect of a "unanimous" verdict of guilt be final for trial purposes while the cause and effect of a "unanimous" verdict of innocent allow further consideration by the petit juries of lesser included offenses in Alaska or in any Court in the United States? The question presented herein and all the implications fairly included therein are very substantial;

«SEE: CATCHER v. UNITED STATES, 582 F.2d 453 (8th Cir. 1978), Where the Court indicated instruction prohibiting jury from considering culpability for lesser included offenses until jury unanimously found defendant not guilty of greater offense was not so erroneous as to be cognizable in postconviction proceeding; however, if defendant reasonably expresses preference for alternative instruction permitting jury to consider lesser included offenses if after all reasonable efforts it is unable to reach verdict on greater offense, district court should give that form of instruction;

and do effect every defendant's due process in all criminal trials everywhere in the United States not just the State of Alaska, because if the lower Court's ruling and M.O. is allowed to stand as valid, it sets an example for the rest of the United States to follow.

cont., on page 14

«SEE: U.S. v. TSAMAS, 572 F.2d 340, 344-7 (2nd Cir. 1978) Cert. denied 435 U.S. 995, 98 S.Ct. 1647.

> Neither an instruction that requires a unanimous verdict of not guilty of greater offenses before the jury to move to the lesser, nor an instruction that it is sufficient to move to the lesser if the jury cannot reach agreement on a conviction of greater offense, is wrong as a matter of law. The court may give the one that it prefers if defendant expresses no choice, but if he makes a choice, the court should give the form of instruction defendant has elected.

«SEE: U.S. v. JACKSON, 726 F.2d 1466 (9th Cir. 1984) Where the court indicated if defendant expresses no choice, trial court may employ either jury instruction requiring jury to unanimously acquit on greater charge before considering lesser included charge or instruction asking jury to consider lesser included offense if it is unable after a reasonable effort to reach verdict on greater offense, it is error to reject the form that is timely requested by defendant.

cont., on page 15

CONCLUSION

Petitioner feels very strongly his due process of law rights have been violated by including the word "unanimously" in the petit jury's instructions because it prejudicially defeated any usefulness of the instruction altogether and had it not been there the jury very well may have considered the lesser included offenses more seriously and possibly convicted petitioner of a much less serious offense.

This Court could substantially advance the criminal justice procedure's while creating uniformity in this Nation's standards of due process of law by making firm rulings on whether the Supremacy of the Federal Constitution demands that in all criminal courts 1) The lesser included offense instruction must be given upon timely request by the defense when evidence supports a lesser included offense; and 2) That the instruction be given unrestricted by language such as "upon unanimous aquital of greater offense," thus, establishing requirements that minimumaly tread on criminal defendants rights and so the legitimate usefulness of such an instruction can be maximized. Thus, holding much as this Court has previously ruled in the past concerning self- incrimination rights.

*SEE: MIRANDA v. ARIZONA, 384 U.S. 436 (1966).

For the forementioned reasons, this Court should take jurisdiction of this petition for Certiorari.

Respectfully submitted and signed September 23rd, 1986,

Onno J. Spierings

Onno J. Spierings, petitioner pro se

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C-1800
1325

P R O C E E D I N G S

THE CLERK: Superior court for the state of Alaska, third district at Anchorage, with the Honorable J. Justin Ripley presiding is now in session.

THE COURT: Please be seated. Further in the matter of State versus Spierings. Gentlemen, you received from me a set of retyped instructions and then you just received Mr. Salemi's -- copies of Mr. Salemi's elements and additional definition. Let's just start with page one, march through them together, and at that point you'll be able to insert the retyped instructions. Instruction number one is faithful performance, ladies and gentlemen. Number 2, the distinguishing features. Number 3, every person that testifies, and that's a 2-page. 3(b), you are not bound to decide in conformity. Number 4, expert witnesses. 5, the constitutional right of a defendant to silence. 6, the indictment charges. 7, the charging document is a mere accusation. 8, is where you should insert the -- probably the first new instruction I gave you. Which says each count sets forth in the indictment charges a separate and distinct offense.

MR. SALEMI: Your Honor, this -- in our work session yesterday this particular instruction was not submitted by either counsel nor by.....

THE COURT: Right. I mentioned that we probably needed one. What's your position on it?

MR. SALEMI: I think that this, in conjunction with the

EXHIBIT - A

additional language the court has put in in the transitional instruction, that enables a jury to move from the charge to lesser includeds is objectionable. I believe that the word, unanimously, should be stricken. I -- I submitted a proposed jury instruction which the court added the word, unanimously, to. I believe that what we are doing is courting a mistrial and it's my understanding, although the court feels this is a dead issue, that unanimously should be put in there, that the case which decided it has been accepted for petition to the Alaska Supreme Court and I think that suggests in and of itself that there is some question. Unanimously -- that language and that concept is found in the verdict forms themselves. And I think that is sufficient. Therefore I would object to -- I would object to this proposed instruction that you asked to insert after 8. This was done sua sponte and I would object also to the -- the unanimously language in the transitional instruction.

THE COURT: Okay. I -- I feel those are 2 different issues. Yesterday in the work session it was brought out that although the 2 counts charge identical offenses and simply describe different victims in truth and in fact different mental states might -- and different levels of culpability might apply to each of the 2 victims. And so I thought it was felt necessary by counsel to attempt to underscore for the jury that each count is different and they could -- they could find him guilty or not guilty of -- in the death of the father and a lesser as to -- or greater as to

the mother. That's why I put in this -- decide each count separately. And I think that's different from your unanimously concept. Isn't it, Mr. Salemi really? I'm not wedded to this. I -- I'm willing to leave it to the common sense of the jury if there's significant objection. But I think this goes a long way toward emphasizing that they really don't do this on a blanket decision basis.

MR. PETERSON: Your Honor, if I could inquire -- I agree we ought to do them -- deal with them each individually. If I can inquire of the court -- or of Mr. Salemi through the court whether or not he objects to all the language or -- or particular sentences. The only one I find troublesome is that -- when it says the defendant may be convicted or acquitted of any or all of the ch -- offenses charged. There's some chance that they might think that means that we can find him guilty of murder, manslaughter, and second degree murder all for the same killing. That's the only part of it that I find troublesome at all. Other than that I have no objection to it.

THE COURT: There's only one offense charged in each count of the indictment. The others are lesser included. Now, I recognize that may be a hypertechnical legal concept.....

MR. PETERSON: My understanding was you were going to go through the instructions and tell them how to use them. In other words, only use the second and third if you get past the first. If that's the case, I don't think it would cause a problem. If

Mr. Salemi wants it out, I have no objection to it being out. Either way is all right with me, Your Honor.

THE COURT: What's your position, Mr. Salemi?

MR. SALEMI: I prefer that it not be included.

THE COURT: Strike it.

MR. SALEMI: With respect to something that Mr. Peterson just raised, and I know Your Honor had mentioned in the work session, is the court planning at the conclusion of the instructions to give some -- something of a verbal instruction which hasn't been submitted or isn't part of the packet at least?

THE COURT: Yes.

MR. SALEMI: I'd ask that the court at the appropriate time review that with counsel again.

THE COURT: This is how it will sound. All right, we'll do it when we get to the verdict forms.

MR. SALEMI: Fine. Thank you.

THE COURT: All right.

MR. PETERSON: Your Honor, as to the other objection he's raised as -- as to the unanimously.....

THE COURT: We'll be covering -- we'll be reaching those instructions in due course.

MR. PETERSON: Okay.

THE COURT: I want him to -- to address it then. We go from number 7, the charging document in this case, to number 8, a person commits the crime of murder in the first degree if. Okay.

As charged in Count I in the indictment. And then 9 is elements of first degree as to Count II. 10, definition of firearm.

MR. SALEMI: Excuse me, Your Honor. You've lost me. I don't have a -- oh, I have it now. 9. Thank you.

THE COURT: 10. Okay. Definition of firearm. 11, intentionally. Now, at this point -- at this point we haven't -- with the elements of first degree murder we haven't raised the need to deal with recklessly and intentionally and serious physical injury. They will come when we go through the lesser includeds. But it's -- unless you gentlemen object I think it would be a -- a better practice perhaps to put those definitions in altogether. Any objection to that, or would you rather have them after they've heard the words in the -- let's do it that way. Disregard -- number --number 11 is intentionally. Number 12 is motive. 13, intent may be proved. 14, a fact may be proved. 15, on or about. Or when in this case. 16, a statement made by a defendant. 17, evidence of good character. That's included without objection by the state I take it?

MR. PETERSON: Yes, Your Honor.

THE COURT: 18, if the evidence warrants it, you may find the defendant guilty of a crime less than murder in the first degree, etcetera. 7 -- excuse me.

MR. PETERSON: That would be number.....

THE COURT: 18.

MR. PETERSON: .....18, Your Honor. I think.....

EXHIBIT - B -

THE COURT: I -- yes, 18. 19 is the first time if you unanimously find appears. I take it that your remarks earlier indicate your objection?

MR. SALEMI: Yes, Your Honor.

THE COURT: That's enough to complete your record as far as I'm concerned.

MR. PETERSON: Your Honor, I'd ask that the court strike it. I -- I don't want to try this case again over the word, unanimously. I -- and I'm deadly serious about that, Your Honor. I -- if it's.....

THE COURT: All right.

MR. PETERSON: .....in the verdict forms and Mr. Salemi doesn't object to it.....

THE COURT: I'll have that stricken.

MR. PETERSON: And that would be instruction number 19, Your Honor?

THE COURT: 19. Then number 20 will be the elements of second degree as they relate to Count -- well, as they relate to both counts, but it's the -- it's the choice of with the intent to cause serious physical injury. All right.

MR. PETERSON: As it turns out, Your Honor.....

THE COURT: You -- you have 2 of them.

MR. PETERSON: Yeah, I think your clerk gave me 2 of the same ones rather than one of each.

THE COURT: All right.

EXHIBIT - C

II, will be verdict form number 4. Not guilty of murder one, but guilty of -- or not guilty of murder two will be 5. And not guilty of both murder one and two, but guilty or not guilty of manslaughter will be number 6. They will be stapled together, 3 each, as to each count.

MR. PETERSON: I have no objection to the verdict forms as Your Honor proposes to use them. I'd ask that you inquire of Mr. Salemi.....

THE COURT: Now -- now I'm going to go through how I'm go -- when I get to that point, I'm going to say that even though they're self-explanatory, this is the way you use them. I'm going to point out that they're stapled separately because they consider each count separately. I will say, if you -- you must address verdict form number 1 first if you're addressing Count I first. If you're addressing Count II first, you'd address 4 first. The point is if you find the defendant not guilty, you go on to the second verdict form. If you find the defendant guilty, you stop and do not fill out the 2 remaining verdict forms. And take them through each one with the stop and go instruction. That's the way I plan to do it. It is ad lib, but it's been.....

MR. SALEMI: For -- for the record, Your Honor, I would object to the jury having to unanimously find a person not guilty of the charged offense before they can move to a lesser included.

THE COURT: Do I not understand that you submitted these.....

EXHIBIT - D

MR. SALEMI: No, I didn't submit.....

THE COURT: This verdict form with unanimously in it?

MR. SALEMI: No, I didn't. I didn't submit any verdict forms.

THE COURT: Very well. I'm misinformed on that. I thought that your first.....

MR. SALEMI: I would suggest that the error which I allege could be cured by striking the word, unanimously, in each of the verdict forms.

THE COURT: Your record is complete.

MR. SALEMI: I'd ask.....

MR. PETERSON: Again, Your Honor, I would request that it be done. We've -- if there's a new case on it that the Alaska supreme court's decide, I'm not -- decided, I'm not familiar with it. And I don't want to try this case again over that. If that -- if that issue is on petition.

THE COURT: Well.....

MR. PETERSON: If Your Honor can give me a moment to check on it, I can check on it, and I'd ask at that time, but I -- I gave it some thought last night and I can find out fairly quickly while we're taking our -- our short time to go through the instructions again whether or not it's a -- something that I want to stand strongly on, but.....

THE COURT: Okay.

MR. SALEMI: Just for the record, Your Honor, my position

is if -- if the jury can't decide unanimously as to not guilty as to the charged offense, then they're stuck there. And they might well be able to find as to a lesser included, but if they can't find unanimity as to the initial charge, then we have a mistrial. And I believe that the lesser included -- the whole purpose is to avoid mistrial.

THE COURT: But not to allow for compromise.

MR. SALEMI: No, I understand.

THE COURT: And since a finding of guilty on a lesser charge is an acquittal as to the greater I believe this is a totally proper concept. I will allow that. I'll make our apologies to the jury and tell them it'll be from 5 to 10 minutes before we begin. Mr. Peterson.....

MR. PETERSON: Thank you, Your Honor.

THE COURT: .....you can check with your -- your appeal section, if you wish. And.....

MR. SALEMI: One last thing, Your Honor.....

THE COURT: I want -- you said that the case -- the -- the name that I could not recall, is.....

MR. SALEMI: Did you say Christie?

THE COURT: No, it's not Christie. It's -- it's in the supreme court? And whoever told me that do you have the name of the case?

MR. PETERSON: Mr. Salemi (indiscernible) Your Honor.

MR. SALEMI: I had been in -- I was informed that the issue

was now before the supreme court. I was informed by Miss Fabe of our office. I wasn't able to get the case from her. She's in Boston now. She told me that week. That's all the information I have about it.

THE COURT: All right.

MR. SALEMI: And it was from her.

THE COURT: It is true that my -- my position on that comes from the court -- or from the court of appeals I'm sure. All right, you let me know and.....

MR. SALEMI: One other thing, Judge.

THE COURT: Yes. If -- if -- well, if you wish, that's the way we'll do it. I'll have those redone, deleting unanimously. If that's your alternate position. I don't believe it's a proper one, but it's your case in that regard. Mr. Salemi, go ahead.

MR. SALEMI: There was some confusion about the photograph which was shown Dr. Blinder yesterday while the jury was not in -- in the courtroom. It was my understanding that once the jury came back he was never shown that picture. It was never offered as evidence, and I don't believe it -- it should have been admitted as evidence. Mr. Peterson had a different understanding.

MR. PETERSON: I understood Your Honor to have admitted it. I did not offer that photograph to Dr. Blinder again in front of the jury.

THE COURT: Okay. Let's get the number of the photograph. It's.....

MR. SALEMI: Thank you.

THE COURT: Thank you. All right. I'll tell the jury 10 minutes and.....

MR. PETERSON: Thank you, Your Honor.

THE COURT: .....Mr. Peterson, you decide whether you want me secretary to modify the verdict forms. And I will have her, in any event, modify those subject instructions. We'll be in recess. There is -- excuse me. There is this. We have some new faces and return of the old. We're going into what is probably the most dramatic stage of a criminal trial, and that is the final argument of counsel. Some of you who have not heard the testimony will be hearing it for the first time, and it will be interesting, it may be amazing, it may be horrifying. Certainly counsel will be putting the most oomph that they can into their argument. And inescapably people make some facial expression in reaction to this. You have to understand, those of you who haven't heard this before, the jury has been focusing on the evidence, the jury has been focusing on the witnesses. Now the jury will be focusing on the lawyers. They're not to be distracted by cheering or booing and hissing from the audience, and that includes any facial response of any kind. Certainly I will now not allow any -- any conversations or reactions of any kind. You're welcome here, but this is a very serious exercise for both tables. And there's a lot of stress on the jury. Particularly this is true, some of you young folks that haven't been here, if something particularly gruesome is

referred to, some of the parents on the jury kind of look out there to see how are the kids taking this. So, let's just keep it poker-faced, all right? Thank you.

THE CLERK: Please rise. Court stands in recess subject to call.

(Court recessed)

THE CLERK: Court now resumes its session.

THE COURT: Please be seated. The state's position as to the use of the word, unanimously, both in the instructions and in the verdict forms?

MR. PETERSON: Your Honor, as long as it makes clear to the jury that they are to consider the charge of murder in the first degree first, which I think it does, I have no objection to the word, unanimously, being removed from both the verdict forms and from the instruction.

THE COURT: And that's your position.

MR. PETERSON: It is, Your Honor.

THE COURT: Do you have any objections to any of the other instructions that I've given or my failure to give any other instructions?

MR. PETERSON: From the state, no, Your Honor.

THE COURT: Mr. Salemi, other than the facts -- or the objections that you have stated do you have any additional objections?

MR. SALEMI: No, Your Honor, except that I did propose

defendant's 11 yesterday related to intent based on the Spidell (ph) case. Your Honor said that he was inclined not to give that. I'm asking that it be given.

THE COURT: Very well. In order to simplify the file then I'm going to strike all your proposed and just include that as your proposed. Because I've given everything else.....

MR. SALEMI: Yes.

THE COURT: .....that you've objected -- that you've wished. And I'll have that included. Now, this concept.....

MR. PETERSON: In the file -- in the file, Your Honor, not in the jury instruction packet, correct?

THE COURT: Correct. All right. It's my judgment that the failure to specify the concept of unanimous verdict before leaving the greater charge will tend to lead toward compromise and is an inappropriate and inaccurate statement of the position of the law. I call your gentlemen's attention to the pattern instruction, 1-60, which is the result of the pattern committee's treatment of this very issue. It's complex, it's wordy, and it bores and tends I think to confuse the jury, but one thing is crystal clear -- reads as follows: Forms of verdict have been prepared for your use. One form is for your use in recording the jury's unanimous verdict as to the guilt or innocence of the accused with respect to the crime of first degree murder. The other form is for your use in the event you should need it in recording the jury's unanimous verdict as to the guilt or innocence of the

accused with respect to the lesser offenses. Unanimous agreement runs throughout that instruction. For example, if your unanimous verdict is that the accused is guilty of the crime of first degree murder, you will return with that verdict to the courtroom. Since in that event it would not be necessary for you to consider or make use of the other forms. On the other hand, if it's not guilty -- if your unanimous verdict is not guilty, etcetera. It's the stop and go instruction.

MR. PETERSON: Does the pattern jury instruction cite any authority, Your Honor?

THE COURT: No.

MR. PETERSON: With respect to that proposition?

THE COURT: No. It simply cites reason and common sense as far as I'm concerned.

MR. PETERSON: Does Your Honor have -- have it prepared both ways at this time?

THE COURT: I have the ver -- I have the verdict forms prepared with the unanimous concept in there. And they're being prepared without the unanimous concept. Recognizing that there may be practical reasons why counsel would accept a verdict, any verdict, rather than attempt to retry it, and granted that if the jury cannot reach a unanimous verdict as to the greater offense, we would have a hung jury. Nevertheless -- nevertheless instructions which invite compromise are improper in my view. Do you persist in your request that I grant Mr. Salemi's request?

And strike unanimous?

(Pause)

MR. PETERSON: I'd ask that Your Honor include the word, unanimously, in both instructions. Both the instruction and the verdict forms.

THE COURT: Very well. Your objection is clear for the record, Mr. Salemi. We're going back to Plan A. And I will include it in both places. Now, let's deal briefly with defendant's B.

MR. SALEMI: Yes, Your Honor.

THE COURT: There's some confusion in the minds of counsel. I think you both thought this was admitted because in a side bar conference I pointed out how I was able I thought to obliterate the titles without calling undue attention to them. In view of the fact that I have admitted 50 -- or 85 I guess it is, do you wish to have this cumulative photograph be submitted or withdrawn? Mr. Salemi?

MR. SALEMI: I'd like it as part of the record, Your Honor.

THE COURT: Certainly. But not -- not.....

MR. SALEMI: But I -- there is no sense in it.....

THE COURT: All right.

MR. SALEMI: ....being shown to the jury.

MR. PETERSON: My understanding in admitting the other one was that you were substituting this one for it in its essence I think is what we arrived at. I don't think there's any need for

it to go to the jury room. And if Mr. Salemi doesn't object.....

THE COURT: Very well. It has not in fact been admitted. It's part of the record because it is defendant's B for identification, Madam Clerk. Are counsel ready to argue?

MR. SALEMI: Yes, Your Honor.

MR. PETERSON: Yes, Your Honor.

THE COURT: Very well. I'll begin the final work on instructions then. Off record.

THE CLERK: Off record.

(Off record)

THE CLERK: Court now resumes its session.

THE COURT: Please be seated. The trial jury is again assembled. This is the time for final argument, ladies and gentlemen. What the lawyers say to you is not of itself evidence. It is their view of what they suggest to you the evidence has established. Certainly they won't seek to mislead you at all, but they are in fact advocates and may tend to see things from their point of view. Ultimately, of course, it's for you to determine what the evidence shows and which witnesses are to be believed. The state goes first, the defense responds, and then the state has the last word because they have the ultimate burden of proof in this case, as you know. Mr. Peterson.

MR. PETERSON: Thank you, Your Honor.

THE COURT: May I ask if you'd center that mike on the podium so that I won't have to interrupt you with reference to

considered with other evidence. A confession is a statement by a defendant which discloses his intentional participation in a criminal act for which he is on trial, and which, if believes, proves his guilt of that crime. You are the exclusive judges as to whether an admission or a confession was made by the defendant, and if the statement is true in whole or in part. If you should find that such a statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part that you find to be true. Evidence of an oral admission of the defendant ought to be viewed with caution. In this case, the defendant has brought forth evidence of good character and has thus placed his character in issue. Evidence of the defendant's character is relevant to the question of the defendant's guilt or innocence because it may be reasoned that a person with good character as to such traits would not be likely to commit the crime of which the defendant is charged. Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty, which doubt otherwise would not exist. You've heard the lawyers mention the concept of lesser included offenses? I'm going to start dealing with those. If the evidence warrants it, you may find the defendant guilty of a crime less than murder in the first degree. However, if the facts and the law warrant a conviction of the crime of murder in the first degree, it is your duty to make such a finding, uninfluenced by your power to find a lesser crime. This provision is not designed to relieve you from the performance of your duties. It is designed to prevent

a failure of justice, if the evidence fails to prove the original charge, but does justify the verdict for the lesser crime. If you unanimously find that the state has not proved beyond a reasonable doubt the crime of murder in the first degree, then you should consider the lesser included offense of murder in the second degree, about which I will now instruct you. The next 2 instructions, then, 20 and 21, are the elements of the offense of second degree murder. And counsel, I'm going to adopt the same practice. I'm going to only read the formal paragraphs at the end of the (indiscernible). As you listen to these 2 instructions, they are slightly different from the elements of murder in the first degree I read to you, because those were virtually identical except only the names were changed. In these instructions, we'll be referring both to the deaths of Timotheaus and Bertina. But their are 2 instructions, because there are 2 theories -- or 2 manners -- which the law would allow if you find the facts to be that way -- would allow -- there are 2 theories under which murder in the second degree can be -- excuse me -- committed. What I want to emphasis at this point is that even though, be instruction, I am combining both the husband and the wife, still, you are admonished that you must decide each count separately. All right? Because you might find one way on one count does not mean that the other count has to automatically follow. Instruction 20: A person commits the crime of murder in the second degree if, with intent to cause serious physical injury to another person, or, knowing that his conduct is substantially certain to cause death or

EXHIBIT - O

Stephan J. DRESNEK, Appellant,

v.

STATE of Alaska, Appellee.

No. A-19.

Court of Appeals of Alaska.

April 12, 1985.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Seaborn J. Buckalew, Jr., J., of one count of manslaughter and two counts of assault in second degree, and defendant appealed. The Court of Appeals, Singleton, J., held that: (1) there was no abuse of discretion in instructing jury that if it "unanimously" found that State had not proved greater offense of manslaughter then it could consider lesser included offense of negligent homicide; (2) it was proper to instruct jury that it could infer that defendant was under influence of intoxicating liquor if it found that there was 10 percent or more alcohol in defendant's blood at time of automobile accident; and (3) sentence was not clearly mistaken.

Affirmed.

1. Criminal Law ⇐787

Mistrial may be declared in case in which jurors cannot agree on greater offense but can agree on lesser offense. Rules Crim.Proc., Rule 31(e).

2. Criminal Law ⇐787

Juror who prefers conviction on lesser offense to conviction on the greater cannot prevent state from obtaining mistrial on the greater if jury cannot agree about it no matter what jury is prepared to do with lesser offense or offenses.

3. Criminal Law ⇐788

There was no abuse of discretion in instructing jury that if it "unanimously" found that State had not proved greater offense of manslaughter then it could consider lesser included offense of negligent homicide, as there was nothing obscure or potentially confusing in relationship between various offenses and no circumstance to indicate that instructions misled jury.

4. Criminal Law ⇐788

Trial court should instruct jury that they are free to discuss evidence and law in any order which they find convenient and may consider lesser included offenses before reaching final agreement on greater offense.

5. Criminal Law ⇐1208(1)

Jury considering drunk driving assault involving motor vehicles, manslaughter, and negligent homicide cases should be made aware of statutory presumptions concerning intoxication, and jury may consider statutory presumptions in reaching its independent judgment regarding defendant's conduct at time of incident in question. AS 28.35.030(a).

6. Automobiles ⇐357

In prosecution for manslaughter and assault in second degree resulting from automobile accident, it was proper to instruct jury that it could infer that defendant was under influence of intoxicating liquor if it found that there was 10 percent or more alcohol in defendant's blood at time of accident. AS 28.35.033(a)(4); Rules of Evid., Rule 303(a)(1).

7. Automobiles ⇐359

Sentence of eight years with three years suspended for manslaughter and two concurrent sentences of three years for second-degree assault, for offenses resulting from automobile accident, was not clearly mistaken in light of standards previously adopted for sentencing those convicted of drunk driving manslaughter. AS 11.41.120(a)(1), 11.41.210(a)(2).

Susan Orlansky, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

Robert D. Bacon, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

EXHIBIT - N

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Stephan J. Dresnek was convicted of one count of manslaughter, AS 11.41.120(a)(1), and two counts of assault in the second degree, former AS 11.41.210(a)(3). Dresnek's offenses resulted from an automobile accident. A two-ton pickup truck driven by Dresnek collided with a smaller vehicle driven by Belinda Reed. Reed died and her passenger, James M. Dunaway, was injured. In addition, one of Dresnek's passengers, Michelle Barrett, suffered serious injuries. Reed's death was the basis for the manslaughter conviction while the injuries to Barrett and Dunaway accounted for the assault convictions. The accident occurred when Dresnek exited a side road without stopping at a stop sign and entered Tudor Road, a major thoroughfare, at approximately forty mph, crossing three lanes and colliding with the Reed vehicle. A blood sample taken two hours after the accident established that Dresnek had a blood-alcohol level of .124%. Dresnek received a sentence of eight years with three years suspended on the manslaughter conviction and concurrent sentences of three years in prison for each assault charge.

Dresnek appeals, making three arguments. First, he contends that the trial court erred in instructing the jury that it had to unanimously acquit Dresnek of manslaughter before it could consider a lesser-included offense—negligent homicide. Second, he contends that the trial court erred in instructing the jury that if it found that there was .10% or more alcohol in Dresnek's blood at the time of the accident, it could infer that he was under the influence of intoxicating liquor. AS 28.35.033-(a)(4). Finally, Dresnek contends that his sentence is excessive. We affirm.

I.

TRANSITION INSTRUCTIONS

The transition instructions given in the present case read as follows:

> If you unanimously find that the state has not proved beyond a reasonable doubt the crime of _____, then you should consider the lesser included offense of _____, about which I will instruct you.[1]

The defendant objected that the word "unanimously" should be stricken. The defendant's alternate proposal would appear to be the Alaska pattern instruction, although he did not so identify it on the record.[2]

In *Nell v. State*, 642 P.2d 1361, 1367 (Alaska App.1982), we approved a transition instruction similar to the instruction given in this case.[3] Dresnek concedes this

and you will then proceed with your deliberations and decide whether the state has proved beyond a reasonable doubt all the essential elements of the lesser crimes of robbery in the second degree or assault in the second degree.

If you find that the state has failed to prove any one of the essential elements of the crime of robbery in the second degree, you must find the defendant not guilty of robbery in the second degree. If you find that the state has failed to prove any one of the essential elements of the crime of assault in the second degree, you must find the defendant not guilty of assault in the second degree.

If you find that the defendant is not guilty of robbery in the first degree, robbery in the second degree, or assault in the second degree, at that point you should consider whether the state has proved the essential elements

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1. These instructions were given as transitions from manslaughter to criminally negligent homicide, from criminally negligent homicide to negligent driving, and from assault in the second degree to assault in the fourth degree.

2. The Alaska pattern jury instruction provides:
If you find that the state has not proved beyond a reasonable doubt the crime of _____, then you should consider the lesser included offense(s) of _____, about which I will now instruct you.
Alaska Pattern Jury Instructions (Criminal) 1.37 (1980).

3. The instruction discussed in *Nell* read in full:
If you find that the state has failed to prove any one of the essential elements of the crime of robbery in the first degree, under Count I of the Indictment, you must find the defendant not guilty of robbery in the first degree.

but contends that *Nell* was wrongly decided and should be overruled. Dresnek reasons that this court misunderstood the authorities upon which it relied in *Nell* and reached a conclusion inconsistent with the rationale for giving lesser-included offense instructions at a defendant's request. Dresnek relies primarily on *United States v. Tsanas*, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978), for the proposition that a defendant should be permitted an election between a transitional instruction similar to the one given here[4] and one which would permit a jury to return a verdict on a lesser-included offense if it is unable to agree on the greater offense. *See also United States v. Jackson*, 726 F.2d 1466, 1469-70 (9th Cir.1984). An instruction of the latter form was adopted by the Seventh Circuit as Federal Criminal Jury Instructions of the Seventh Circuit 2.03. It reads:

> of the crime of mischief in the third degree. If the state has failed to prove any of the essential elements of the crime of mischief in the third degree, you should find him not guilty of any crime under Count I of the Indictment.
>
> When considering Count II of the Indictment, you should return a verdict of not guilty, or guilty for the crime of theft in the second degree.

Nell, 642 P.2d at 1367 n. 9.

4. The instruction at issue in *Tsanas* and *Jackson* read substantially as follows:
Verdict—Lesser Included Offense
The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment-information, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.
So, if the jury should unanimously find the accused "Not Guilty" of the crime charged in the indictment (information) then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged.
The crime of _____ which is charged in the indictment in this case, necessarily includes the lesser offense of _____.
The jury will bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in any crime charged in the indictment (information); the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.
1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 18.05 (3d ed. 1977). This is former Devitt & Blackmar, *Federal Jury Practice and Instructions* § 17.11 (2d ed. 1970). *See Tsanas*, 572 F.2d at 344. *See supra* note 1 for the instruction given in this case.

2.03 LESSER INCLUDED OFFENSE

The crime of _____ with which the defendant is charged in the indictment includes the lesser offense of _____.

If you find the defendant not guilty of the crime of _____ charged in the indictment [or if you cannot unanimously agree that the defendant is guilty of that crime], then you must proceed to determine whether the defendant is guilty or not guilty of the lesser offense of _____.

This instruction is set out in *Pharr v. Israel*, 629 F.2d 1278, 1282 (7th Cir.1980). The *Pharr* court specifically refers to the bracketed material as a way of conforming with *Tsanas*.

[1] The *Tsanas* and *Jackson* courts[5] are ambiguous regarding the precise defect

5. Dresnek also relies on a number of cases from other jurisdictions which disapprove a *Nell* type instruction. They are based in part on the jury's right to nullification and compromise. These cases reason that a *Nell* type transition instruction prevents a jury from exercising its power of nullification and hinders a jury in reaching compromise verdicts. *See State v. Ogden*, 35 Or.App. 91, 580 P.2d 1049, 1053-55 (1978) (Johnson, J., specially concurring); *People v. Mavs*, 407 Mich. 619, 288 N.W.2d 207, 211-12 (Mich.1980) (Coleman, C.J., dissenting). We rejected similar arguments in *Hartley v. State*, 653 P.2d 1052, 1055 (Alaska App.1982) (discussing Michigan lesser-included offense cases and rejecting a jury right of nullification); *see also Christie v. State*, 580 P.2d 312, 320 n. 38 (Alaska 1978) (juries should not reach verdicts by compromise).
Dresnek does not, however, rely on either nullification or compromise. He concedes that the jury may be given the following pattern instruction:
If the evidence warrants it, you may find the defendant guilty of a crime less than (principal offense). However, if the facts and the law warrant a conviction of the crime

they find in a *Nell*-type transition instruction. On the one hand they may be reasoning that a defendant has a right to a partial verdict convicting him of a lesser-included offense if a jury is able to reach it, even though the jury is unable to agree on the greater offense. The *Tsanas* court might then conclude that such a verdict would operate as a final determination of the defendant's guilt on the greater offense. *See United States v. Tsanas*, 572 F.2d at 345, 346 n. 7; *United States v. Jackson*, 726 F.2d at 1469. If this is the explanation we rejected its premises in *Staael v. State*, 697 P.2d 1050 (Alaska App.1985), where we held that the trial court may find manifest necessity and declare a mistrial permitting retrial on a greater offense even if a jury which is deadlocked on the greater offense might be able to return a unanimous verdict convicting the defendant of a lesser-included offense. *See also Hughes v. State*, 668 P.2d 842 (Alaska App.1983).[6]

[2] Alternatively, these cases may be reasoning that a *Nell*-type transition instruction is coercive in that it prevents the jury from even considering lesser-included offenses until they have reached final agreement on the greater offense. Thus a juror convinced that a defendant was innocent of a greater offense but guilty of the lesser offense might convict of the greater offense rather than vote his conscience if he did not understand that conviction of the lesser offense was a possible outcome. This seems to be Dresnek's primary contention. In a sense this is a difficult proposition to prove since a lesser-included offense by definition is included in the greater offense. Consequently, a jury cannot consider the elements of the greater offense without simultaneously considering the elements of the lesser-included offense. All of the instructions are read to the jury at once prior to the beginning of deliberations. In most cases it is difficult to see how a juror would be unaware that a unanimous conviction on the lesser was an alternative to an acquittal on all charges.[7]

of (principal offense), it is your duty to make such finding uninfluenced by your power to find a lesser offense. This provision is not designed to relieve you from the performance of your duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge but does justify the verdict for the lesser crime.

Alaska Pattern Jury Instructions (Criminal) 1.38 (1980).

6. Dresnek also finds support in Alaska Criminal Rule 31(c) which provides in relevant part:

Conviction of Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or the offense necessarily included therein if the attempt is an offense. *When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.* (Emphasis supplied.)

Dresnek reads this rule to require a jury unable to agree on a greater offense but able to agree on a lesser offense to return a verdict on the latter as a complete resolution of the case.

Criminal Rule 31 is based generally upon Federal Rule of Criminal Procedure 31. The underlined language, however, does not appear in the federal rule and apparently was taken from former ACLA § 66-13-75 (1949) which provided:

Effect of doubt as to degree of crime. That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.

This provision was apparently taken from the old Field Codes via Oregon, and similar provisions appear in the codes of a number of the western states. *See* Brown, *The Sources of the Alaska and Oregon Codes* (pts I & II), 2 UCLA—Alaska L.Rev. 15, 87 (1972-1973). Courts interpreting similar statutes have held that a defendant upon request is entitled to an instruction in the language of the statute and that a general instruction about reasonable doubt is not sufficient where there are lesser-included offenses with support in the record. These cases also hold that the reference to "degrees" does not limit the statute to crimes broken down into degrees but refers to lesser and greater offenses generally. *See, e.g., State v. Trujillo*, 225 Kan. 320, 590 P.2d 1027 (1979); *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (Idaho 1967); *People v. Dewberry*, 51 Cal.2d 548, 334 P.2d 852 (1959).

We find nothing in Alaska Rule of Criminal Procedure 31(c) or the statutes upon which it is based that precludes a mistrial in a case in which the jurors cannot agree on a greater offense but can agree on a lesser offense. *See People v. Avalos*, 37 Cal.3d 216, 207 Cal.Rptr. 549, 689 P.2d 121 (1984) (considering a similar statute).

[3, 4] We recognize, however, that Alaska has adopted the cognate approach to lesser-included offenses and that cases could arise in which the relationship between the greater offense and the lesser-included offenses might be less clear. *Marker v. State*, 692 P.2d 977 (Alaska App., 1984); *Minano v. State*, 690 P.2d 28 (Alaska App.1984). In the instant case, we find nothing obscure or potentially confusing in the relationship between the various offenses and no circumstances to indicate that the instructions misled the jury. We therefore conclude that there was no abuse of discretion in using the *Nell* instruction. Nevertheless, in order to ensure that juries are aware that they are free to discuss the evidence and the law in any order which they find convenient, we hold that trial courts instructing juries after publication of this opinion should make this clear.

Trial judges should choose appropriate instructions for this purpose. One approach is suggested by CALJIC 17.10 and 17.12.[8]

We are concerned that a jury might read the Seventh Circuit *Tsanas*-type instruc-

7. Of course a juror who preferred conviction on a lesser offense to conviction on the greater might prefer the latter to a mistrial on the greater offense. Such a juror cannot, however, prevent the state from obtaining a mistrial on the greater if the jury cannot agree about it no matter what the jury is prepared to do with the lesser offense or offenses. *See Staael v. State*, 697 P.2d 1050 (Alaska App.1985); *Hughes v. State*, 668 P.2d 842 (Alaska App.1983).

8. CALJIC 17.10 and 17.12 read as follows:

CALJIC 17.10 (1984 Revision)

Conviction of Lesser Included or Lesser Related Offense

If the jury is not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged and it unanimously so finds, it may convict him of any lesser offense if the jury is convinced beyond a reasonable doubt that he is guilty of such lesser offense.

[The offense of ________ is a lesser offense to the offense charged in Count ______]

[The offense of ________ is a lesser offense to the offense charged in Count ______]

[The offense of ________ is a lesser offense to the offense charged in Count ______]

CALJIC 17.12 (1984 Revision)

Jury May Return Partial Verdict—Non-Homicide

In this case, defendant is charged [in Count ______] with the offense of (greater offense) ________ [and ________] [is a] [are] lesser offense[s].

The court [has provided] [will provide] you with verdict forms for each count charged and for each lesser offense. You should determine whether defendant is guilty or not guilty of the offense of (greater offense) [charged in Count ______] [and any special finding you are directed to make]. If you unanimously agree that defendant is guilty of said offense [charged in Count ______] [and any special finding you are directed to make], you will have your foreman date and sign the guilty verdict [and return with it into court]. Nothing further will be then required of you [as to Count ______].

However, if you unanimously agree that defendant is not guilty of such offense, you will have your foreman date and sign the not guilty verdict for that crime and you will determine whether defendant is guilty or not guilty of the lesser offense of ________. If you unanimously agree that defendant is guilty or not guilty of said lesser offense of ________ you will have your foreman date and sign such guilty or not guilty verdict [and return it into court together with the not guilty verdict on the offense of (greater offense) [charged in Count ______] [as well as any special finding you are directed to make].

[If you unanimously agree that the defendant is not guilty of ________ [and ________], you will determine whether defendant is guilty of the lesser offense[s] of ________ [and ________].]

You will note from this instruction that you must unanimously agree that the defendant is not guilty of the greater offense before you may find the defendant guilty or not guilty of any lesser offense. If you are not able to unanimously agree on the greater offense, your foreman shall report such fact to the court.

If you unanimously agree that defendant is not guilty of the offense of (greater offense) [or ________] [charged in Count ______], but after due and sufficient deliberation you cannot agree that defendant is guilty or not guilty of any lesser offense, your foreman shall report such fact to the court and then return to the court the signed not guilty verdict of the offense of (greater offense) [charged in Count ______].

You will note from this instruction that if you unanimously agree that defendant is not guilty of the offense of (greater offense) [charged in Count ______], you must have your foreman date and sign such verdict and return it into court regardless of what may happen in your deliberations on any lesser offense[s].

2 *California Jury Instructions—Criminal* §§ 17.10, 17.12 (4th ed. Supp.1984).

tion to require a jury that was unanimously convinced of the defendant's guilt on a lesser-included offense to return a verdict convicting him of that offense even though the jury was deadlocked on the greater offense.

As the commentary to the California instructions points out, the jury is free to deliberate on the charged offense (the greater offense) and the lesser-included offenses in any order it wishes. The jury is merely precluded from returning a verdict on a lesser offense without also returning a verdict on the greater offense. *California Jury Instructions* at 175 (Supp.1984).

The California instructions distinguish between the jury's right to deliberate about the elements of a lesser-included offense before deciding the greater offense and the preclusion on returning a verdict on the lesser-included offense without deciding the greater offense. In this regard they are preferable to the *Nell* instruction and the transition instruction approved in *Pharr v. Israel*, 629 F.2d 1278, 1282 (7th Cir.1980), which do not make this distinction.

II.

INTOXICATION PRESUMPTIONS

[5, 6] Over defense objection, the judge instructed the jury in accordance with the presumptions concerning intoxication contained in AS 28.35.033(a).[9] It appears that this section became effective after the present offense was committed but prior to Dresnek's trial. Dresnek does not object on this ground. Rather, he contends that the presumptions only apply to drunk driving prosecutions and not to prosecutions for manslaughter or negligent homicide where recklessness and negligence are predicated on intoxication. We believe that our decision in *Pena v. State*, 664 P.2d 169 (Alaska App.1983), *rev'd on other grounds*, 684 P.2d 864 (Alaska 1984), weighs strongly against such a reading of the statute. In *Pena*, we held that the "implied consent" to a blood test provided in AS 28.35.031 applied without distinction to both prosecutions for drunk driving and prosecutions for other crimes arising out of driving while intoxicated. 664 P.2d at 172. In any event, we are satisfied that the presumptions established in AS 28.35.033(a) reflect a legislative judgment regarding the interrelationship between blood-alcohol levels and competence to drive. We believe that a jury considering drunk driving, assault (involving motor vehicles), manslaughter, and negligent homicide cases should be made aware of this legislative judgment. *Cf. Ferrell v. Baxter*, 484 P.2d 250 (Alaska 1971) (violation of traffic statute constitutes negligence *per se*). While we are not prepared to say that a blood-alcohol level in excess of the statutory presumption necessarily establishes criminal recklessness or culpable negligence as a matter of law, *but see Lupro v. State*, 603 P.2d 468, 474–75 (Alaska 1979) (interpreting former law to this effect), we believe that the statutory presumptions are matters which the jury may consider in reaching its independent judgment regarding the defendant's conduct at the time of the incident in question. The trial court complied with Alaska Rule of Evidence 303(a)(1) when it instructed the

9. The jury was instructed as follows:

Under Alaska law, when a person is alleged to be operating a motor vehicle under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, may give rise to the following inferences:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, it may be inferred that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, that fact standing alone, gives rise to no inference.

(3) If there was 0.10 percent or more by weight of alcohol in the person's blood, it may be inferred that the person was under the influence of intoxicating liquor.

You may consider as a factor in your evaluation of the defendant's conduct whether or not he was under the influence of intoxicating liquor at the time of the accident. An inference is merely a conclusion you may draw from a set of facts, but are not required to do so.

jury regarding the presumption against the accused in this case. *See Erickson v. Anchorage*, 662 P.2d 963, 965–67 (Alaska App. 1983). We are satisfied that no error occurred.

III.

SENTENCE

[7] Dresnek argues that his sentence of eight years with three years suspended for manslaughter and two concurrent sentences of three years for second-degree assault are excessive. He stresses his good work record, his lack of any criminal convictions, and what the defense characterizes as a minor record of traffic violations. We have carefully considered the record in light of the standards previously adopted for sentencing those convicted of drunk driving manslaughter. In light of those standards, the sentence imposed was not clearly mistaken. *See Clemans v. State*, 680 P.2d 1179, 1189–90 (Alaska App. 1984); *Gibbs v. State*, 676 P.2d 606, 608 (Alaska App.1984); *State v. Lamebull*, 653 P.2d 1060, 1061–62 (Alaska App.1982); *State v. Lupro*, 630 P.2d 18, 20–21 (Alaska App.1981). While the facts of each case differ to a certain extent from Dresnek's, his situation being in some cases more favorable and in others less favorable than that of the drivers whose conduct was considered, we are satisfied on balance that the sentence imposed by Superior Court Judge Seaborn J. Buckalew, Jr., was not clearly mistaken and was in line with prior authority.

The judgment and sentence of the superior court are AFFIRMED.

KEY NUMBER SYSTEM

Ron D. ROMO, Appellant,

v.

MUNICIPALITY OF ANCHORAGE, Appellee.

No. A-462.

Court of Appeals of Alaska.

April 12, 1985.

Defendant pleaded nolo contendere and was convicted in the District Court, Third Judicial District, Anchorage, Elaine M. Andrews and Natalie K. Finn, JJ., of refusal to submit to chemical breath test for alcohol, and he appealed. The Court of Appeals, Singleton, J., held that: (1) police officer was justified in performing investigatory stop for the purpose of administering field sobriety test; (2) implied consent ordinance is not unconstitutionally vague; and (3) defendant was not denied constitutional and statutory right to counsel.

Affirmed.

1. Arrest ⚿68(4)

General questions put to a person, even a suspect at scene of crime, do not constitute a Fourth Amendment seizure. U.S.C.A. Const.Amend. 4.

2. Arrest ⚿68(4)

Fourth Amendment seizure, which depending on other circumstances may be either investigative stop or full arrest, exists only when officer, by means of physical force or show of authority, has in some way restrained liberty of a citizen. U.S.C.A. Const.Amend. 4.

3. Arrest ⚿68(4)

Whenever reasonable person would believe that his attempt to break off discussion with police officer and leave scene would result in actual restraint or other physical violence, he is restrained and has been seized as that term is used in Fourth Amendment. U.S.C.A. Const.Amend. 4.

THE COURT OF APPEALS OF THE STATE OF ALASKA

ONNO J. SPIERINGS, Appellant, v. STATE OF ALASKA, Appellee.	)	File No. A-64 SUMMARY DISPOSITION* [No. 817 - April 24, 1985]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Tina Kobayashi, Assistant Public Defender, and Dana Fabe, Public Defender, Anchorage, for Appellant. Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.

Onno J. Spierings shot and killed his parents and was convicted of two counts of first-degree murder. AS 11.41.100(a)(1). He received two concurrent sentences of fifty years with thirty years suspended. Spierings appeals, making two arguments. First, he contends that the trial court erred in giving a transitional instruction, requiring that the jury unanimously acquit him of first-degree murder before it could consider the lesser-included offense of second-degree murder. We rejected Spierings' argument in Dresnek v. State, 697 P.2d 1059, Op. No. 455 (Alaska App., April 12, 1985), and Neil v. State, 642 P.2d 1361 (Alaska App. 1982). We find no error.

Spierings next argues that the trial court abused its discretion by allowing into evidence a photograph, taken by the police, of Spierings' open suitcase. The picture depicts four paperback books on top of clothing. The titles of three of the books were visible: War God, Soldiers for Hire, and The Badge of the Assassin. Spierings argues that the only issue in controversy at trial was his mens rea at the time of the incident since he conceded shooting his parents but contended that diminished responsibility reduced his offense to manslaughter. He reasons that a jury considering the titles of his chosen reading matter might infer a violent disposition and an intent to kill and reject his claim of diminished responsibility.

We are satisfied that the trial court did not abuse its discretion. While hardly conclusive, the neatness with which Spierings packed his bag and his inclusion of reading material, regardless of the content of that material, provided some evidence that Spierings was not in a dissociative state at the time he packed the suitcase and therefore at approximately the time he killed his parents. A.R.E. 401. In addition, given the substantial evidence at trial regarding Spierings' interest in firearms, ammunition and related material, admission of the evidence, even if error, was harmless. See Love v. State, 457 P.2d 622 (Alaska 1969). Cf. A.R.E. 403.[1]

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*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

1. In Page v. State, 657 P.2d 850, 851-53 (Alaska App. 1983), we affirmed a trial court decision refusing to admit evidence that the victim read pornographic books which the defendant offered to show that

(Footnote Continued)

The judgment of the superior court is AFFIRMED.

(Footnote Continued)

the victim was likely to commit homosexual rape. We reasoned that in the absence of expert testimony the nexus between reading pornography and committing homosexual rape was speculative. We distinguished Keith v. State, 612 P.2d 977, 983-84 (Alaska 1980), where the supreme court permitted evidence that the victim had written a journal which disclosed violent thoughts to support an inference that the victim was the aggressor because the nexus between violence and aggression may be a matter of common knowledge. In the instant case, there was some evidence introduced through Dr. Martin Blinder to show a nexus between the books in Spierings' suitcase and the state's theory of the case.

Id. at 733–34 (citation omitted). While this pre-ICWA case is significant because Congress sought to confirm its holding, the case also states a well-established principle that the waiver of Indian rights should not be easily inferred. *See* Cohen, Handbook of Federal Indian Law 283 (1982 ed.). Case law also holds that procedural requirements must be strictly complied with before a state can exercise jurisdiction over a matter that otherwise would be within a tribe's jurisdiction. *See, e.g., Blackwolf v. District Court*, 158 Mont. 523, 493 P.2d 1293, 1295 (1972).

With these principles in mind, we hold that the trial court erred in finding that Kaltag had waived its jurisdiction over J.M. There certainly was no evidence of an express waiver, and it would be inappropriate to find an implied waiver based on the evidence presented here. Because one of the objectives of the ICWA is to insure that tribes fully understand and have an opportunity to exercise their rights under the act, *see, e.g.*, 25 U.S.C. § 1912(a), we conclude that a tribe's waiver of exclusive jurisdiction must be express, unequivocal and knowingly made. Requiring a written waiver from the tribal entity authorized to make such a decision will help insure that a tribe has notice of the rights it is giving up, and will avoid the confusion that occurred in this case.[5]

Because we conclude that the trial court erred in failing to dismiss the proceedings involving J.M., we do not decide whether the termination of parental rights was proper. That determination will be made in the tribal forum.[6]

5. The requirement of a written waiver will benefit both the state and the Indian tribe involved. By affording both parties a clear understanding whether the tribe is waiving jurisdiction to determine a child's ultimate placement, the need for litigation should be avoided. Also, the parties will have a solid basis for negotiating an agreement, if they so choose, regarding the care and custody of an individual child and whether the state is to provide foster care payments. *See infra* note 6 for a discussion of 25 U.S.C. § 1919(a), which authorizes such agreements.

6. One final argument merits mention. Kaltag suggests that even if the tribe did waive its exclusive jurisdiction, the state could not assert jurisdiction absent a formal agreement under section 1919(a) of the ICWA. Section 1919(a) authorizes tribes and states to enter into mutual agreements "respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis...." 25 U.S.C. § 1919(a). However, we note that the section merely "authorize[s]" such agreements; it does not purport to preclude the state's exercise of jurisdiction where a tribe has clearly expressed an intent to waive jurisdiction. *Cf. Native Village of Stevens v. Smith*, 770 F.2d 1486, 1489 (9th Cir.1985).

The superior court order terminating the parental rights of A.M. is VACATED, and the case is REMANDED for dismissal of the state court proceedings.

Stephan J. DRESNEK, Petitioner,

v.

STATE of Alaska, Respondent.

Onno J. SPIERINGS, Petitioner,

v.

STATE of Alaska, Respondent.

Condrat KRUKOFF, Petitioner,

v.

STATE of Alaska, Respondent.

Robert OKPEAHA, Jr., Petitioner,

v.

STATE of Alaska, Respondent.

John B. BALENTINE, Petitioner,

v.

STATE of Alaska, Respondent.

Nos. S-963, S-973, S-1085, S-1122 and S-1231.

Supreme Court of Alaska.

May 2, 1986.

Defendant was convicted in the Superior Court, Third Judicial District, Anchor-

EXHIBIT - J

age, Seaborn J. Buckalew, Jr., J., of one count of manslaughter and two counts of assault in second degree, and defendant appealed. The Court of Appeals, 697 P.2d 1059, affirmed and defendant petitioned for hearing. Other appeals were taken from the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, Ralph E. Moody, and Seaborn J. Buckalew, Jr., JJ., and Superior Court, Second Judicial District, Barrow, Michael I. Jeffery, J., and petitions for hearing from the Court of Appeals were filed. The Supreme Court, held that a trial court may give, over the criminal defendant's objection, a "transition" instruction that the jurors must unanimously find the defendant not guilty of a greater offense before they may render a verdict on whether he is guilty of any lesser included offense.

Affirmed.

Rabinowitz, C.J., dissented and filed opinion in which Burke, J., joined.

Criminal Law ⇐798

A trial court may give, over defendant's objection, a "transition" instruction that the jurors must unanimously find the defendant not guilty of a greater offense before they may render a verdict on whether he is guilty of any lesser included offense.

Susan Orlansky, Asst. Public Defender, Anchorage, Dana Fabe, Public Defender, Anchorage, for petitioners Stephan A. Dresnek and Condrat Krukoff.

Robert D. Bacon, Cynthia M. Hora, Asst. Attys. Gen., Anchorage, Harold M. Brown, Atty. Gen., Juneau, for respondent.

Tina Kobayashi, Asst. Public Defender, Anchorage, Dana Fabe, Public Defender, Anchorage, for petitioner Onno J. Spierlings.

William A. Davies, Asst. Public Defender, Fairbanks, Dana Fabe, Public Defender, Anchorage, for petitioner Robert Okpeaha, Jr.

Sen K. Tan, Asst. Public Defender, Anchorage, Dana Fabe, Public Defender, Anchorage, for petitioner John B. Balentine.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

We have granted review in these cases, limited to the question of "whether a trial court may give, over the criminal defendant's objection, a 'transition' instruction that the jurors must unanimously find the defendant not guilty of a greater offense before they may render a verdict on whether he is guilty of any lesser included offense." The court of appeals answered this question in the affirmative. We agree for the reasons stated by the court of appeals in *Dresnek v. State*, 697 P.2d 1059 (Alaska App.1985).

AFFIRMED.

RABINOWITZ, Chief Justice, joined by BURKE, Justice, dissenting.

I would reverse the court of appeals' decision in *Dresnek v. State*, 697 P.2d 1059 (Alaska App.1985). There is a real danger that instructing the jury that they cannot enter a guilty verdict on the lesser included offense unless they first unanimously acquit on the greater offense will vitiate a defendant's right to a lesser included offense instruction.

We have held that a trial court's failure to give an instruction properly requested by the defendant on a lesser included offense is error. *Christie v. State*, 580 P.2d 310, 313 (Alaska 1978). We stated the rationale for our ruling as follows:

> [W]hen facts are put in evidence which support instructions as to lesser degrees and they are not given, the jury may be faced with the choice either of acquitting a man who is obviously guilty of some wrong or of finding guilty a man who is not guilty of the crime charged.

Id. at 318 (citations omitted). This pressure to convict is magnified when eleven jurors vote to convict on the charged offense, and one juror has a reasonable doubt as to defendant's guilt on that offense, but believes the defendant guilty of some offense. The pressure could be enormous on that juror to vote to convict on a charge of which he has reasonable doubt, rather than to "hold out" and leave a guilty defendant unconvicted. The lesser included instruction is therefore necessary to ensure that the defendant is "accorded the full benefit of the reasonable doubt standard." *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 2388, 65 L.Ed.2d 392, 400 (1980), and to protect against "the substantial risk that the jury's practice will diverge from theory." *Keeble v. U.S.*, 412 U.S. 205, 212, 93 S.Ct. 1993, 1997, 36 L.Ed.2d 844, 850 (1973).[1] Defendant's right to such an instruction is required by due process in capital cases, *Beck*, 447 U.S. at 637–38, 100 S.Ct. at 2389–90, 65 L.Ed.2d at 402–03, and arguably is required by due process in non-capital cases. *See, Hopper v. Evans*, 456 U.S. 605, 611–12, 102 S.Ct. 2049, 2052–53, 72 L.Ed.2d 367, 373 (1982); *Ferazzo v. Mintzes*, 735 F.2d 967, 968 (6th Cir.1984); *Miller v. Stagner*, 757 F.2d 988, 993 (9th Cir.1985).

If the jury is instructed that it cannot convict a defendant of the lesser included charge unless it first unanimously votes to acquit on the greater charge, it will be subjected to the same pressure to ignore the reasonable doubt standard that it would face if no lesser included offense instruction were given at all. If the jury is split eleven to one for conviction on the greater charge, the juror who has a reasonable doubt as to defendant's guilt on the greater charge but who would convict on the lesser included, will be faced with the same dilemma of voting to convict on the greater offense or leaving a guilty defendant unconvicted by forcing a mistrial. *See, United States v. Tunnas*, 572 F.2d 340, 345–46 (2nd Cir.1978), *cert. den.* 435 U.S. 995, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978); *United States v. Jackson*, 726 F.2d 1466, 1470 (9th Cir.1984) (per curiam). The dissenting juror knows that the defendant cannot be convicted on the lesser included offense unless the other eleven jurors, convinced beyond a reasonable doubt, change their minds and vote to acquit on the greater offense.

The court of appeals' opinion, which a majority of this court now adopts, is unresponsive to this argument. The court of appeals characterized the argument as suggestive that the unanimity instruction was coercive:

> . . . in that it prevents the jury from even considering lesser-included offenses until they have reached final agreement on the greater offense. Thus a juror convinced that defendant was innocent of a greater offense but guilty of the lesser offense might convict of the greater offense rather than vote his conscience if he did not understand that conviction of the lesser offense was a possible outcome. *Dresnek*, 697 P.2d at 1062.

The court of appeals responded that since a jury cannot consider the elements of the greater offense without simultaneously considering the elements of the lesser offense, "it is difficult to see how a juror would be unaware that a unanimous conviction on the lesser was an alternative to an acquittal on all charges." *Id.* at 1062.

1. The Supreme Court stated in *Beck*:
> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. 447 U.S. at 634, 100 S.Ct. at 2388, 65 L.Ed.2d at 400–401, quoting from *Keeble*, 412 U.S. at 212–213, 93 S.Ct. at 1997–98, 36 L.Ed.2d at 850 (emphasis in original).

The problem, however, is that whether or not the jury can "consider" the lesser included offense, the juror "holding out" for acquittal on the greater offense still knows that because of the unanimity instruction the defendant cannot be convicted for the lesser included offense. The court of appeals did seem to recognize the possibility that a juror would prefer conviction on the greater charge to a mistrial. 697 P.2d at 1063, n. 7. The court of appeals stated:

> Such a juror cannot, however, prevent the state from obtaining a mistrial on the greater if the jury cannot agree about it no matter what the jury is prepared to do with the lesser offense. *Id.*

This argument does not respond to the possibility that such a juror could "prevent mistrial" by voting to convict on the greater charge, even though he was not convinced beyond a reasonable doubt.

The state emphasizes its entitlement to a verdict on the charged offense. In this regard it argues that not instructing the jury that it must unanimously acquit on the greater offense in order to enter a verdict on the lesser included offense inevitably will lead to "compromise verdicts" where the jury will not vigorously deliberate the greater charge, but instead will quickly slide to the common ground of a guilty verdict on the lesser included charge. The state believes that this possibility is particularly unfair because if the jury convicts on the lesser included offense, the jury's silence on the greater charged offense would serve as an "implied acquittal", precluding the state from retrying the defendant on that offense. *See, Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

It should not be lightly assumed that a jury that is instructed that it must use all reasonable efforts to reach a verdict on the charged offense will ignore this instruction and quickly reach a verdict on the lesser included offense. A conviction on a lesser included charge is not a "compromise" verdict if all the jurors agree that the defendant is guilty of this charge and genuinely disagree about whether the defendant is guilty of the greater charge.

While[2] the state's arguments are not without merit, they are outweighed by the defendant's fundamental concerns that a unanimity instruction may result in his conviction on the greater offense by a jury consisting of some jurors who have reasonable doubt as to his guilt on that charge. As one court put it, the defendant should at least be allowed to choose the instruction because "[i]t is his liberty that's at stake." *Thomas*, 572 F.2d at 346.

I conclude therefore that it was reversible error for the superior court to have refused to instruct the jury as the defendants requested.[3] *See, Thomas*, 572 F.2d 340; *Jackson*, 726 F.2d 1466; *Catches v. United States*, 582 F.2d 453, 458–59 (8th Cir.1978); *State v. Korbel*, 231 Kan. 657, 647 P.2d 1301, 1305 (1982) ("if you cannot agree" instruction not error because it did not require jury to unanimously acquit on the greater offense); *People v. Mays*, 407 Mich. 619, 288 N.W.2d 207 (1980) (per curiam); *State v. Muscatello*, 57 Ohio App.2d 231, 387 N.E.2d 627 (1977), *aff'd*, 55 Ohio St.2d 201, 378 N.E.2d 738 (1978); *State v. Martin*, 64 Or.App. 469, 668 P.2d 479 (1983).

2. I agree with the result the majority reaches in *Staael. Staael v. State*, — P.2d — (Op. No. 3050, Alaska, May 2, 1986). Since Staael was not convicted at his first trial there is no possibility that the first jury was coerced into convicting him on the greater offense by the unanimous acquittal instruction. I agree with the majority's decision to dismiss Staael's petition for hearing as improvidently granted on the issue of whether double jeopardy bars reprosecution for a charged offense where the jury indicates it is unable to reach a verdict as to that offense and the court declares a mistrial over defense objection.

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY 1986

NO. 86-5373

ONNO J. SPIERINGS, PETITIONER,

V.

STATE OF ALASKA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ALASKA

MOTION FOR APPOINTMENT OF COUNSEL

AT PUBLIC EXPENSE

I, ONNO J. SPIERINGS, hereto motion this Court for appointment of counsel at public expense. Petitioner has difficulty obtaining discovery. Petitioners inexperience, lack of knowledge of the law and this Court's procedure could be considerably advanced with competant experienced assistance of counsel.

DATED: September 23, 1986.

Respectfully Submitted,

Onno J. Spierings

Onno J. Spierings

Reg. No. 80392-011
U.S.P. Lompoc
3901 Klein Blvd
Lompoc, CA 93436

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY 1986

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ONNO J. SPIERINGS, PETITIONER,

V.

STATE OF ALASKA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ALASKA

CERTIFICATE OF SERVICE

I, Onno J. Spierings hereby swear "under penalty of perjury" that I mailed a true and correct copy of the following documents:

(a) "MOTION FOR LEAVE TO FILE A LATE JURISDICTIONAL STATEMENT WITH THE QUESTION IN CHIEF INCLUDED THEREIN," dated 9/23/86;

(b) "JURISDICTIONAL STATEMENT," dated and signed 9/23/86; and

(c) "MOTION FOR APPOINTMENT OF COUNSEL AT PUBLIC EXPENSE," dated and signed 9/23/86; to the following:

Attorney General of Alaska
Mr. Harold M. Brown
Pouch "KC"
Juneau, Alaska 99811

This was accomplished by placing said copies in an envolope, addressing same to address indicated above, with sufficient postage placed thereon for mailing first class mail, and then petitioner deposited same said parcel in the "Special Mail" inmate mail box in hallway of the United States Penitentiary Lompoc in California for mailing to address indicated above on or before October 10th, 1986.

Respectfully submitted,

Onno J. Spierings

Onno J. Spierings, petitioner pro se

OPPOSITION

BRIEF

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-5373

ONNO J. SPIERINGS,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

HAROLD M. BROWN
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: Robert D. Bacon
Assistant Attorney General

Office of Special Prosecutions and Appeals
1031 W. 4th Ave.
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Anchorage, Alaska 99501
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QUESTION PRESENTED

Whether a state criminal jury may be instructed, over the defendant's objection, that they must acquit the defendant on the charged offense before rendering any verdict on a lesser included offense?

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JURISDICTION

As discussed in more detail in the "Argument" portion of this response, it does not appear that the petitioner presented any federal question to the state courts of Alaska. Nor did the state courts consider or decide any federal question. This being so, the petitioner's claims are not within the jurisdiction of this Court, and certiorari snould be denied.[1]

STATEMENT OF THE CASE

On December 28, 1981, Onno Spierings, age 19, shot and killed his parents, Timotheus and Bertina (or "Tim" and "Tina") Spierings, at the family home

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[1]The State of Alaska has been served with two versions of Spierings's petition for certiorari, one dated July 20, 1986, and one dated September 23, 1986. This response is intended to respond to both.

near Wasilla, Alaska. The senior Spierings were each shot five times in the head while in bed. [Tr. 431, 434] Spierings admitted the killings. [Tr. 530-31, 564-66]

Spierings was indicted on two counts of first-degree murder. [R. 3] Jury trial was held in April 1983 in the Superior Court of Alaska, Third Judicial District, at Anchorage. Spierings's defense was that he was unable to form an intent to kill because of diminished mental capacity. [Tr. 662-63] An intent to kill is an element of first-degree murder under Alaska law. Alaska Stat. 11.41.100(a)(1).

On each count, the jury was instructed on second-degree murder and manslaughter as lesser included offenses. [R. 34-35, 37] The verdict in a criminal case in the Alaska courts must be unanimous. Alaska R. Crim. P. 31(a). The court, over defense objection, instructed the jury that they must unanimously find Spierings not guilty of first-degree murder before considering the lesser included offense of

second-degree murder. Likewise, the jury was instructed that they must unanimously find Spierings not guilty of second-degree murder before considering the lesser offense of manslaughter. In each instance, the jury instruction read:

> If you unanimously find that the state has not proved beyond a reasonable doubt the crime of [greater offense], then you should consider the lesser included offense of [name], about which I will now instruct you.

[R. 33, 36] The defense urged that the word "unanimously" be omitted. Spierings did not allege that the instructions would violate his federal constitutional rights. [Tr. 760, 767-70, 776-79]

The jury convicted Spierings of first-degree murder on both counts. [R. 46-47]

The Alaska Court of Appeals affirmed Spierings's convictions summarily on the authority of its then-recent decision in Dresnek v. State, 697 P.2d 1059 (Alaska App. 1985). Spierings v. State, Summary Disposition No. 817, April 24, 1985.

Neither Spierings's brief nor the court's opinion referred to any provision of the federal Constitution.

Spierings's petition for hearing was granted by the Alaska Supreme Court, which joined his case with Dresnek and a number of others raising the same issue. The Supreme Court adopted the opinion of the Court of Appeals in Dresnek as its own and affirmed all the convictions. Dresnek v. State, 718 P.2d 156 (Alaska 1986). Again in the Supreme Court, Spierings did not cite any provision of the federal Constitution or otherwise allege that the case raised any federal question. (There are in his brief a few references to "constitutional rights," none of which identifies any specific provision of either the federal or the state Constitution. [Petr.Br. 11, 13, 28, 46])

At trial and throughout the state appellate process, Spierings was represented by counsel from the Alaska Public Defender Agency.

SUMMARY OF ARGUMENT

Certiorari should be denied because Spierings is presenting his federal question for the first time in this Court. In the state courts, the jury instruction issue was argued and decided as a matter of common law.

The Fourteenth Amendment due process clause does not forbid an instruction that the jury must acquit the defendant on the charged offense prior to rendering any verdict on a lesser included offense. No court has ever held that such an instruction is constitutionally forbidden.

Beck v. Alabama, 447 U.S. 625 (1980), and Keeble v. United States, 412 U.S. 205 (1973), on which Spierings relies, are not apposite. In those cases no lesser included offense instructions at all were given, while here the jury was instructed on lesser included offenses.

The instruction which Spierings believes to be constitutionally required would permit a verdict on a lesser

offense without any verdict on the charged offense. This would allow a defendant to be acquitted of the crime charged in the indictment when the jury was in fact hung, and so would deprive the government of its right to a jury verdict on the offense for which the defendant has been indicted. Such a result is inappropriate and is not required by the due process clause.

United States v. Jackson, 726 F.2d 1466, 1469-70 (9th Cir. 1984)(per curiam), and United States v. Tsanas, 572 F.2d 340, 344-46 (2d Cir.)(dictum), cert. denied, 435 U.S. 995 (1978), on which Spierings also relies, are common law decisions which do not address the constitutional question he raises. Furthermore, their reasoning does not withstand careful analysis and was correctly rejected by the Alaska courts below.

ARGUMENT: CERTIORARI SHOULD BE DENIED

I. Spierings Did Not Present a Federal Question to the State Courts.

At no time did Spierings suggest in the state courts that the issue concerning the jury instructions presented any federal question. Nor did the state courts discuss or decide any federal question. Rather, throughout the state court proceedings the issue was treated as one of common law, and of interpretation of the Alaska Rules of Criminal Procedure. At all stages of the state court proceedings, Spierings was represented by skilled defense counsel. Cf. Pollard v. United States, 352 U.S. 354, 359 (1957); Price v. Johnston, 334 U.S. 266, 292 (1948).

This being so, Spierings has not preserved any federal question and is not entitled to invoke the jurisdiction of this Court. Webb v. Webb, 451 U.S. 493 (1981); Street v. New York, 394 U.S. 576, 581-82 (1969); Cardinale v. Louisiana,

394 U.S. 437 (1969); see New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 68 (1928).[2]

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[2]Spierings presented a different issue to the state appellate courts than he presented in the trial court, but since the state appellate courts actually ruled on the issue he presented the State acknowledges that his failure to present it in the trial court would not by itself preclude its presentation to this Court. Raley v. Ohio, 360 U.S. 423, 436 (1959). The only objection Spierings made to this jury instruction in the trial court was to the inclusion of the word "unanimously." Given Apodaca v. Oregon, 406 U.S. 404 (1972), this plainly could not raise a federal question. On appeal in the state courts, the State submitted that the instruction Spierings proposed at trial -- the one without the word "unanimously" -- had the same effect as the one the judge gave, since under Alaska law a jury in a criminal case cannot render any verdict at all unless it is unanimous. In the state appellate courts, Spierings changed his position and argued that the jury should be able to consider lesser included offenses merely upon their inability to agree on the charged offense.

Spierings did allege that the state courts should follow the holding of United States v. Jackson, 726 F.2d 1466, 1469-70 (9th Cir. 1984)(per curiam), and the dicta in United States v. Tsanas, 572 F.2d 340, 344-46 (2d Cir.), cert. denied, 435 U.S. 995 (1978). But neither of those cases discusses or decides any constitutional question. They also treat the issue as one of common law.

The few generalized references to "constitutional" rights in Spierings's brief to the Alaska Supreme Court, not invoking any specific provision of either the federal or the state Constitution, are inadequate to preserve a federal question. Zimmerman, supra, 278 U.S. at 67-68. The tone of these references seems to be that Spierings's position was preferable, among other reasons, because it offered better protection to a defendant's rights than did the State's position. At no point did he explicitly urge what he urges now -- that the instruction given in his case was forbidden by the federal Constitution.

Certiorari should therefore be denied for failure to preserve a federal question below.

II. An Instruction That Acquittal on the Charged Offense is a Prerequisite to Any Verdict on a Lesser Included Offense Does Not Violate the Due Process Clause.

A

Assuming he had properly preserved his federal constitutional question, Spierings would not be entitled to prevail on the merits. The due process clause of the Fourteenth Amendment does not entitle a defendant to consideration of lesser included offenses if the jury is merely unable to agree on a verdict on the charged offense.

Apparently only two reported cases have ever considered this due process question. In both of them, the defendant's due process claim was rejected. Pharr v. Israel, 629 F.2d 1278 (7th Cir. 1980), cert. denied, 449 U.S. 1088 (1981); State v. Martin, 488 N.E.2d 166,

169 (Ohio), cert. granted only on another issue, ___ U.S. ___, 106 S.Ct. 1634 (1986). The certiorari petition in Martin, No. 85-6461, included this question, but the Court's grant of certiorari was limited to another question and did not encompass this one. See 39 Crim. L. Rptr. 4034. The due process issue was noted but not decided in Catches v. United States, 582 F.2d 453, 458-59 (8th Cir. 1978). Spierings cites no decisions accepting a due process claim such as his, and there appear to be none.[3]

B

Spierings alleges that instructions requiring acquittal on the charged offense prior to consideration of lesser offenses (hereafter simply "acquittal"

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[3]Many more courts, like the Alaska courts below and the three federal circuits discussed later in this response, have considered as a matter of common law what type of instruction should be given to juries in this situation.

instructions) are inconsistent with Beck v. Alabama, 447 U.S. 625 (1980), and Keeble v. United States, 412 U.S. 205 (1973). He alleges that an "acquittal" instruction effectively denies a defendant the benefits of lesser included offense instructions. This is not so. All the proper purposes of lesser included offense instructions are still served when an "acquittal" transition instruction is given.

This being so, Beck and Keeble are inapposite, because those were cases in which no lesser included offense instructions at all were given.

In Beck, the Court held that in a capital case, if the evidence would support a verdict of guilty on a lesser, non-capital, offense, the jury must be given the option of returning a verdict on that lesser offense. Beck held unconstitutional a unique Alabama procedure which precluded the giving of lesser included offense instructions only in death penalty cases.

The holding of Beck is confined to death penalty cases. 447 U.S. at 638 &

n.14. The present case is not a death penalty case.[4] Insofar as Spierings may be suggesting that the Beck rule should be extended beyond death penalty cases, this is not the case in which to consider the question, because lesser included offense instructions were given at the trial of this case.

Spierings also seeks to rely on Vickers v. Ricketts, 798 F.2d 369 (9th Cir. 1986). It does not support his position. In Vickers, the Ninth Circuit granted habeas corpus relief to an Arizona state prisoner in a death penalty case on the authority of Beck, because no lesser included offense instructions at all had been given at his trial in state court. (Parenthetically, the Arizona Supreme Court has recently held as a

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[4]Alaska does not have the death penalty. The maximum penalty for first-degree murder in Alaska is 99 years in prison. Alaska Stat. 12.55.125(a). Spierings is serving two concurrent sentences of 50 years with 30 suspended. [R. 48-50]

matter of common law that when lesser included offense instructions are given, juries must be instructed in the way Spierings's jury was instructed -- that they may not render a verdict on a lesser included offense unless they unanimously acquit on the charged offense. State v. Wussler, 679 P.2d 74, 76 (Ariz. 1984).)

The other decision on which Spierings principally relies, Keeble v. United States, 412 U.S. 205 (1973), is also inapposite because it also was a case in which no lesser included offense instruction at all was given. Keeble was not a constitutional decision. It construed the Major Crimes Act, which confers federal jurisdiction over certain specifically enumerated crimes committed on Indian reservations. The Court held that a defendant being prosecuted under this act was entitled to have the jury instructed on a lesser offense which found support in the evidence, even if that lesser offense was not one enumerated in the Act itself.

Keeble and Beck both emphasize the potential value of lesser offense

instructions to a defendant. They would have relevance to this case only if Spierings were correct when he assumes that the giving of a transition instruction requiring acquittal of the charged offense totally deprives the defendant of the benefit of lesser offense instructions.[5] But Spierings is in error in that assumption.

A defendant still benefits from lesser included offense instructions even with an "acquittal" transition instruction. The danger of an unwarranted conviction for the charged offense, when the government has proven only part of its case, is prevented by the jury's mere knowledge that lesser included offenses are available, no matter what transition instruction is

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[5]Spierings also seems to believe that the double jeopardy clause is violated if the jury acquits the defendant on the charged offense and goes on to consider a lesser included offense. [9/23/86 Petn. at 12] There is, of course, no such rule.

given. This is the reason that defense counsel continue to request lesser included offense instructions even when "acquittal" transition instructions are given.

The complete instructions, including all the possible lesser included offenses and all the possible verdicts, are read aloud to the jury before they begin deliberations. Throughout deliberations, they have a written copy of the complete instructions with them, along with all the verdict forms. The jurors therefore know about the potential lesser offenses, even though they are told that they must acquit on the charged offense before reaching a verdict on a lesser offense.

The state courts below recognized that an "acquittal" transition instruction still gives the defendant the benefit of lesser included offenses: "[S]ince a lesser-included offense by definition is included in the greater offense..., a jury cannot consider the elements of the greater offense without simultaneously considering the elements of the lesser included offense."

Dresnek, 697 P.2d at 1062. Under an "acquittal" transition instruction, the only thing the jury may not do is render a verdict on a lesser included offense without rendering a verdict of acquittal on the charged offense.

Thus an "acquittal" transition instruction presents no greater danger than an "inability to agree" instruction that minority-view jurors will be coerced by their fellows, or that a jury will find a defendant guilty without proof of all elements beyond a reasonable doubt.

But if a jury is allowed to avoid rigorous deliberation on the charged offense by returning a verdict on a lesser offense, this creates the substantial possibility that a verdict of conviction on a lesser offense will be returned by the jury even though some of its members are convinced beyond a reasonable doubt that the defendant is in fact guilty of the charged offense. Those jurors would have voted for conviction on the lesser offense not because they believed it to be the appropriate verdict but in order for the

jury to reach some verdict. See People v. Boettcher, 503 N.Y.S.2d 810, 814-15 (A.D. 1986). A hung jury and a retrial is to be preferred to such an unprincipled compromise verdict.

A transition instruction requiring acquittal will lead to a hung jury in a hard case; an "inability to agree" instruction such as Spierings advocates will lead to a compromise verdict. A defendant has no due process right to the latter.

Talk about the "benefits" of lesser included offense instructions can easily degenerate into tactical gamesmanship. But the essential benefits of such instructions are to society and the legal system as a whole. All litigants benefit when the jury is required to deliberate rigorously and not take the path of least resistance. All litigants benefit when the jury has verdicts available to fit the facts it finds, and is not tempted to stretch the facts to fit a verdict. The defendant's right to proof beyond a reasonable doubt is protected, as is the government's right to a verdict on the

charged offense. Such a scheme is not forbidden by the Constitution.

C

The instruction which Spierings believes to be constitutionally required would permit a verdict on a lesser offense without any verdict on the charged offense. This would allow a defendant to be acquitted of the crime charged in the indictment when the jury was in fact hung, and so would deprive the government of its right to a jury verdict on the offense for which the defendant has been indicted. Such a result is inappropriate and is not required by the due process clause.

By contrast, the requirement that the jury reach a verdict of acquittal on the charged offense before returning any verdict on a lesser offense serves several purposes. It guarantees both parties thorough jury consideration of the charged offense. It increases the likelihood that the jury will render an accurate and legally correct verdict in light of the facts which they find. It guarantees to the public that a defendant

will not be acquitted of the crime with which he has been charged unless the jury unanimously concludes that the government has failed to prove its case. It is consistent with existing interpretations of the double jeopardy clause as it applies to lesser included offenses.

As noted in the statement of the case, Alaska law requires the jury verdict in a criminal case to be unanimous. Alaska R. Crim. P. 31(a). This means, of course, that a verdict of acquittal must be unanimous, as well as a verdict of conviction. A jury which is divided is not entitled to return any verdict.

The arguments in this response are phrased in terms of unanimity, but the principles are equally valid for the states which permit juries to return verdicts by a vote of 10-2. In those states, a jury is not entitled to return a verdict of acquittal unless at least 10 jurors concur. A jury more closely divided than 10-2 is not entitled to return a verdict of acquittal.

"The Government, like the defendant, is entitled to resolution of the case by verdict from the jury." Richardson v. United States, 468 U.S. 317, ___, 104 S.Ct. 3081, 3086 (1984). This means, of course, a verdict on the charged offense, the offense for which the grand jury has found probable cause and the defendant is on trial. See Ohio v. Johnson, 467 U.S. 493, ___, 104 S.Ct. 2536, 2542 (1984)(defendant may not avoid trial on a charged offense by pleading guilty to a lesser included offense over the government's objection). Spierings's proposed constitutional rule is simply inconsistent with that principle. His proposed rule would deny the government a verdict on the charged offense by allowing a jury which deadlocked on the charged offense to return a verdict convicting him of some lesser offense rather than announcing that they are unable to resolve the charged offense.

Moreover, the double jeopardy clause would impart significant consequences to such a compromise verdict. If the jury reaches a verdict of guilty on one of the

lesser included offenses while remaining silent on the charged offense, the defendant has received an implied acquittal of the charged offense and double jeopardy principles preclude a new trial on the charged offense. Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957). Under the rule proposed by Spierings, a jury finding itself unable to agree on the defendant's guilt or innocence of the charged offense would be encouraged to return a verdict on a lesser included offense. Such a verdict, under Price and Green, would amount to a verdict of acquittal on the charged offense without the unanimity required by state law. The rule adopted by the Alaska Supreme Court avoids this outcome.

There is a public interest in having a person convicted of the highest charge supported by the evidence. There is a public interest in avoiding an unintended implied acquittal by the jury's silence. Spierings's position would undercut these interests.

An "inability to agree" instruction such as Spierings believes to be constitutionally required invites the jury to determine on its own when it is unable to agree, without necessarily giving the charged offense the rigorous deliberation which a judge would insist upon before he declares a mistrial on account of a hung jury. It therefore gives too little emphasis to the government's stake in a verdict on the charged offense.

A jury which finds itself temporarily stymied on the charged offense may decide that the path of least resistance is to go down the lesser included offenses until it reaches the first one upon which the requisite number of jurors are willing to convict, rather than trying to reach a verdict one way or the other on the charged offense.

The ABA Criminal Justice Standards make clear that juries on their own are much more likely to believe that they are deadlocked than a judge applying the "manifest necessity" standard will be.

However, just as a court may abuse its discretion by

> holding a jury too long [the Allen charge problem], it may also abuse its discretion by discharging a jury too quickly. A too hasty discharge will bar a second trial of the defendant, unless the defendant has consented thereto.
>
> .... Court decisions likewise take the view that a trial judge should not discharge a jury merely because they report that they have not been able to agree, but instead should determine whether there is a reasonable prospect of their being able to agree.

3 American Bar Ass'n., Standards for Criminal Justice § 15-4.4(c) at page 15.144 (2d ed. 1980).

If, after receiving an "inability to agree" transition instruction, a jury reported a verdict of guilty on a lesser included offense under these circumstances, it is by no means clear that the trial judge could always (by questioning the jury) establish manifest necessity for declaring a mistrial on the charged offense. If the judge could not, society

would pay a high price: Price and Green would preclude retrial of the charged offense. United States v. Perez, 9 Wheat. (22 U.S.) 579 (1824).

D

The Ninth Circuit has held, and the Second and Eighth Circuits have stated in dictum, that it is not error to give either an "acquittal" instruction or an "inability to agree" instruction, unless the defendant expresses a preference, in which case the defendant's choice should be honored. United States v. Jackson, 726 F.2d 1466, 1469-70 (9th Cir. 1984) (per curiam); United States v. Tsanas, 572 F.2d 340, 344-46 (2d Cir.), cert. denied, 435 U.S. 995 (1978); Catches v. United States, 582 F.2d 453, 458-59 (8th Cir. 1978). None of these decisions rests on constitutional grounds.

Although giving the defendant his choice of transition instructions may have some superficial appeal, it cannot withstand analysis. Specifically, this Tsanas-Jackson position is inconsistent with the facts that (1) lesser included offense instructions are not given

exclusively or primarily for the defendant's benefit and (2) the concept of proof beyond a reasonable doubt does not entitle a defendant to acquittal on the charged offense if the required number of jurors are unable to agree on a verdict.

Tsanas does not adequately take into account the underlying interests of the government. A reference to the rule that penal statutes are to be strictly construed in favor of the defendant passes for an explanation why the government may as a practical matter be denied any verdict at all on the offense with which the grand jury has charged the defendant. 572 F.2d at 346. Acquittal when fewer than the requisite number of jurors agree to convict is not a corollary of the rule of strict construction, any more than it is a corollary of the requirement of proof beyond a reasonable doubt.

Jackson assumes without analysis that "acquittal" transition instructions deny the defendant any benefit from lesser included offense instructions and

so are inconsistent with Beck and Keeble. 726 F.2d at 1470. Prior pages of this response demonstrate that this is not so.

The Alaska courts below correctly rejected the reasoning of Tsanas and Jackson. Dresnek, supra, 697 P.2d at 1061-64.

Tsanas and its progeny do not help Spierings, both because they do not purport to be constitutional decisions and because their reasoning does not withstand careful analysis.

E

Instructions requiring acquittal on the charged offense are constitutionally permissible. They do not allow a jury to be coerced into returning a verdict which does not reflect the considered judgment of each juror. They protect all parties against a compromise verdict. They protect the defendant's right not to be convicted of the charged offense in the absence of proof of each element beyond a reasonable doubt. But they do not allow a hung jury to be converted into an acquittal on the charged offense. They do not allow a jury to decide on its own

that it has reached an unresolvable impasse on the charged offense. Hence they also protect the public interest in obtaining thorough jury consideration of the charged offense and, if at all possible, a verdict on that offense.

CONCLUSION

The petition should be denied.

Respectfully submitted November 7, 1986, at Anchorage, Alaska.

HAROLD M. BROWN
ATTORNEY GENERAL OF
THE STATE OF ALASKA

By: Robert D. Bacon
Robert D. Bacon
Assistant Attorney General

OPINION

SUPREME COURT OF THE UNITED STATES

ONNO J. SPIERINGS v. ALASKA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

No. 86-5373. Decided December 15, 1986.

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In this case, the Supreme Court of the State of Alaska affirmed petitioner's conviction, rejecting his argument that the trial judge improperly instructed the jury on a lesser-included offense. 718 P. 2d 156 (Alaska 1986). Over the petitioner's objection, the trial judge gave a "transition instruction"; the jurors were instructed that they could not render a verdict on a lesser-included offense until they unanimously acquitted the petitioner on the greater offense. The Alaska Supreme Court held that the instruction was proper. This decision conflicts with the approach followed in the Courts of Appeals for the Second and Ninth Circuits. In *United States* v. *Tsanas*, 572 F. 2d 340 (CA2), cert. denied, 435 U. S. 995 (1978), the court held that if a defendant seasonably objects to this type of instruction, the trial judge should instruct the jury with an alternate formulation: jurors may consider the lesser-included offense if they cannot reach agreement on the greater offense. *Id.*, at 346. The Court of Appeals for the Ninth Circuit, in *United States* v. *Jackson*, 726 F. 2d 1466 (CA9 1984), followed the *Tsanas* approach. There, the court reasoned that "although either formulation may be employed if the defendant expresses no choice, it is error to reject the form timely requested by defendant." *Id.*, at 1469. I would grant the petition of certiorari to resolve this conflict.